Brown & Root Industrial Services *and* International Brotherhood of Electrical Workers, Local Union No. 995, AFL–CIO, CLC. Case 15–CA–14814

June 4, 2002

DECISION AND ORDER

BY CHAIRMAN HURTGEN AND MEMBERS LIEBMAN AND COWEN

On June 28, 2000, Administrative Law Judge Philip P. McLeod issued the attached decision. The General Counsel filed exceptions and a supporting brief, and the Respondent filed an answering brief.

The National Labor Relations Board has delegated its authority in this proceeding to a three-member panel.

The Board has considered the decision and the record in light of the exceptions and briefs and has decided to affirm the judge's rulings, findings,[1] and conclusions and to adopt the recommended Order.

This case involves allegations that the Respondent unlawfully refused to consider or hire certain applicants because of their union affiliation or activities. The judge recommended that the complaint be dismissed in its entirety, correctly finding that the General Counsel did not establish that the Respondent's decisions were unlawfully motivated.[2]

In particular, we agree with the judge that the General Counsel failed to show a nexus between the Respondent's hiring decisions at issue and certain statements made by Robert Swanson, a supervisory foreman at the Respondent's Port Hudson/Georgia Pacific project. Swanson made these statements to Union Business Agent Clifford Zylks, indicating concern when Zylks informed him that he was applying for work as an open "union organizer." Swanson, however, was foreman only for the Port Hudson project's instrument department, and his role in hiring at that site was limited entirely to the selection of instrument fitters. All of the alleged discriminatees, including Zylks, applied for work as electricians, and Swanson consequently had no role in processing their applications. The record also establishes that electrician applications were filed separately from instrument fitter applications, and that Swanson never met the alleged discriminatees other than Zylks or even knew of their applications. For these reasons, Swanson's statements do not support an inference that the Respondent's hiring decisions regarding the alleged discriminatees were motivated by union animus. See *Brand Mid-Atlantic, Inc.*, 304 NLRB 853 (1991); *M.A.N. Truck & Bus Corp.*, 272 NLRB 1279, 1297 (1984). Having found no nexus between Swanson's statements and the Respondent's alleged unlawful failures to consider or hire, we need not decide whether those statements expressed union animus.

ORDER

The complaint is dismissed in its entirety.

Dated, Washington, D.C. June 4, 2002

Peter J. Hurtgen, Chairman

Wilma B. Liebman, Member

William B. Cowen, Member

(SEAL) NATIONAL LABOR RELATIONS BOARD

Leslie Troop, Esq. and *Charles R. Rogers, Esq.*, for the General Counsel.

Howard S. Linzy, Esq. and *Bethany Brantley Johnson, Esq. (The Kullman Firm)*, for the Respondent.

DECISION

STATEMENT OF THE CASE

PHILIP P. MCLEOD, Administrative Law Judge. I heard this case in Baton Rouge, Louisiana, on May 24–28, September 27–October 1, October 5–8, and October 25–29, 1999.

This case originated with a charge filed on May 1, 1998,[1] by the International Brotherhood of Electrical Workers, Local Union No. 995, AFL–CIO, CLC (the Union) against Brown & Root Industrial Services (Brown & Root or Respondent). On June 23, the Union filed an amended charge. On July 31, the Regional Director for Region 15 issued a complaint and notice of hearing alleging that Respondent violated Section 8(a)(1) and (3) of the National Labor Relations Act (the Act) by refusing to hire or to consider various named individuals for hire at its Port Hudson and Geismar, Louisiana, jobsites because of

[1] The General Counsel has excepted to some of the judge's credibility findings. The Board's established policy is not to overrule an administrative law judge's credibility resolutions unless the clear preponderance of all the relevant evidence convinces us that they are incorrect. *Standard Dry Wall Products*, 91 NLRB 544 (1950), enfd. 188 F.2d 362 (3d Cir. 1951). We have carefully examined the record and find no basis for reversing the findings.

[2] However, we do not rely on the judge's characterization of the distinction between "subjective criteria" and "objective criteria," or on his use of those terms, with respect to the General Counsel's and the Respondent's respective burdens of proof, set forth in *FES (A Division of Thermo Power)*, 331 NLRB No. 20 (2000).

[1] All dates herein refer to 1998 unless otherwise indicated.

their union affiliation. There are no allegations of any independent violations of Section 8(a)(1) of the Act.

This case arises out of the Union's "salting" efforts. The essence of the complaint and the argument advanced by the General Counsel and the Charging Party is that Brown & Root refused to hire certain applicants who were "voluntary union organizers" because of this fact.

On August 12, the Respondent filed a timely answer to the complaint in which it admitted certain allegations, including the filing and serving of the charges; its status as an employer within the meaning of the Act; the status of the Union as a labor organization within the meaning of the Act; and the status of certain individuals as supervisors and agents of Respondent within the meaning of Section 2(11) of the Act. Respondent denied having engaged in any conduct which would constitute an unfair labor practice within the meaning of the Act.

At the trial herein, all parties were represented and afforded full opportunity to be heard, to examine and cross-examine witnesses, and to introduce evidence. In her opening statement at the beginning of the trial, then-counsel for the General Counsel Leslie Troop[2] advised the court and Respondent that her theory included allegations of discrimination not just at the Shell and Georgia Pacific projects, but all projects which were staffed by Respondent's Gonzales, Louisiana hiring office. Therefore, also included were Respondent's projects with BASF and Vulcan. She also explained that her theory included not just journeymen electrician positions, but also electrical helpers and instrument fitters.

Respondent contended that the case should be limited in scope to the hiring practices at the two particular jobsites named in the complaint: the Georgia Pacific jobsite located in Port Hudson, Louisiana, and the Shell jobsite located in Geismar, Louisiana. Respondent also argued that the case should be limited to journeyman electrician positions, and not include electrical helpers and instrument fitters.

While I did so with some reluctance, I allowed counsel for the General Counsel to put on evidence regarding this expansive theory in order to avoid a possible remand, and further delay, if it was denied. A substantial part of my reason for doing so was because the Shell/Geismar project was staffed through Respondent's personnel office located in Gonzales, Louisiana, which also served to staff the BASF project and the Vulcan project, both of which were also in or near Geismer. As the evidence subsequently showed, the Vulcan project did not come into existence until 1999. All of the applications at issue preceded the existence of the Vulcan project and the vast majority of the applications had been inactive for many months. In the end, the BASF and Vulcan projects have little significance to this case. That is an observation, however, that can now be made only from hindsight, having received and considered the evidence as a whole.

Counsel for the General Counsel and Respondent filed timely briefs which have been duly considered.[3] Upon the entire record in this case, and from my observation of the witnesses, I make the following

FINDINGS OF FACT

A. Background

For about 15 years, Brown & Root contracted to perform a number of small projects at the Georgia Pacific paper mill in Port Hudson, Louisiana. Respondent recently obtained contracts to perform considerably more expansive work with Georgia Pacific, and new contracts with Shell, BASF, and Vulcan in Geismar, Louisiana. In order to staff these latter projects, and others it may secure in the general area, Respondent established a personnel/hiring office in nearby Gonzales.

The Union began its "salting" efforts at the Georgia Pacific/Port Hudson project. On January 19, 1998, nine individuals, asserting on their applications that they were affiliated with Local Union 995, completed applications. One more was filed on January 21; three more on February 24; and a final one on March 17, 1998.

At Gonzales, four applications from alleged discriminatees were filed on January 19; five more on January 20; four on January 21; five on January 22; six on January 26; and the remainder in mid to late February (5), March (1) and, finally, June (1).

B. Animus

Counsel for the General Counsel offered evidence regarding only two incidents that it claims show animus on the part of Respondent toward the Union. The first is a tape recording made by Union Business Agent Clifford Zylks of a telephone conversation with Robert Swanson, foreman of the instrument department at the Port Hudson/Georgia Pacific project. The second is Zylks' testimony regarding an exchange with Louis Widemire at the Gonzales hiring office during which Widemire would not let Zylks post a union flyer on Respondent's bulletin board.

While not asserting that the telephone conversation between Zylks and Swanson contains any independent violation of Section 8(a)(1) of the Act, counsel for the General Counsel argues that animus is found in the following exchange:

[2] After the trial was adjourned on May 28 to give Respondent time to produce the voluminous material subpoenaed by counsel for the General Counsel, Leslie Troop resigned from the Board to enter private practice. She was replaced by Charles R. Rogers. This change of counsel resulted in additional delay, as a result of which we were not able to resume until September 1999.

[3] This trial lasted several weeks and produced a voluminous transcript, particularly in the number of exhibits introduced. At the conclusion of the trial, I pointed out to counsel and the parties those areas where I thought their case was weakest and which needed special attention in their posttrial briefs. No less than three extensions of time for filing briefs were granted. From Respondent, I received a 300-page document with proposed findings of fact and conclusions of law analyzing the transcript in detail and convincingly addressing each of the areas I called to its attention. From counsel for the General Counsel, I received a 12-page summary of accusations against Respondent and an altogether conclusionary argument with little or no discussion of the actual transcript of this proceeding. Counsel for the General Counsel did little, if anything, to address the areas I called to its attention.

RS (Swanson) Uh, lets see, let me get my paper work out. When can you be available for work?

CZ (Zylks) I can come to work right now.

RS How many years you got with instruments.

CZ Uh, I've been doing electrical & instruments right at 21 years. I'm the union organizer. I'm Cliff Zylks.

RS Are you.

CZ And, uh, we do it all over here in Local 995. We do the instruments and the electrical work.

RS Yes, what I'm looking for is pretty much a person who if I throw out there. . . .

CZ Uh-huh.

RS They got to do it pretty much on there [sic] own.

CZ Why sure, that's what we do.

RS And you know this is a non-union, you know, company.

CZ Right, right, that's right, right. Non-union company. I like the opportunity to come out there and organize your people.

RS No, well, we don't organize you, well Brown & Root, uh, a non-union company, you know, we don't organize and never have been that way, you know that, you know and uh . . .

CZ I'm sure qualified for the job.

RS Well, you know, I'd put you to work but, you know, you know I'd be more than happy to hire you.

CZ Okay.

RS But, I'm going to tell you straight up, you know, you know, I don't want any union trouble or anything like that, you know.

CZ Right. I'd love to come organize your guys, you know.

RS How can you organize a non-union company, you know . . .

CZ I'd like to talk to the guys and give them the opportunity to join the union.

RS Yes, but this is a non-union company.

CZ Right.

RS And . . .

CZ I got, I can offer them benefits, retirement and health & welfare in fact and can offer them a total package of, uh . . .

RS Yes, but who's going to pay for it?

CZ Well, we like to set down and maybe get all the guys together and maybe do something about it, you know.

RS Yes, uh, I don't think that's going to happen.

CZ Okay.

RS Cause these are pretty much road hands that stayed with Brown & Root for years.

CZ Right.

RS and, uh, uh you know, we're as happy as we can be the way we are.

CZ Right, I understand.

RS The company takes pretty good care of us.

CZ You the foreman out there.

RS I'm over the instrument department.

CZ Okay, you the superintendent then?

RS Well, I'm the General Foreman.

CZ Oh, okay.

RS We don't have a superintendent on this job.

. . . .

CZ I am the union organizer.

RS Yes.

CZ Local 995.

RS Yes, while you're out here I wouldn't want to here that, you know, you know, I just don't need that trouble, you know what I mean, and uh I can get my people off another Brown & Root job, you know.

CZ Right, well I live right here locally and I'd love to come over and work for you.

RS Well, I'm going to pull your application and I'll take a look at it.

CZ Okay.

RS You know, if you came out here, I just don't need that kind of trouble, you know what I mean, you know I know it sounds Greek to you, but it sounds like a pain in the ass to me cause all my guys are pretty tight they usually travel together pretty good. But we put out a lot, quite a few locals too. Matter of fact, last time I was out here most of my people was local anyway.

CZ Right.

RS Well, let me pull your application and I'll see what I can do.

CZ Thank you, Bud.

RS Okay.

CZ Bye-bye.

I am not impressed with the tape recorded conversation. As is more fully described below, Swanson played no part in the decision not to hire any of the alleged discriminatees. Further, Zylks, a paid union representative and alleged discriminatee, was obviously trying to bait Swanson. Swanson, the record shows, had no training regarding Respondent's personnel and hiring policies until after he had completed his hiring for this project. Counsel for the General Counsel does not contend that in the recorded conversation Swanson in any way violated Section 8(a)(1) of the Act.

Even when this conversation is analyzed in a light most favorable to counsel for the General Counsel, Swanson's comments are at best ambiguous. While it is true Swanson said, "I don't want any union trouble," it is clear from the context that he was primarily referring to the likely reaction Zylks would receive from employees. If there is any doubt about this, it is made clear just before the end of the conversation when Swanson said, "You know, if you came out here, I just don't need that kind of trouble, you know what I mean, you know I know it sounds Greek to you, but it sounds like a pain in the ass to me cause all my guys are pretty tight they usually travel together pretty good." To equate antiunion animus with Swanson's statements that "this is a nonunion company" or "we don't organize and never have" or "I don't want any union trouble" or any combination of those sentiments is to make a significant and unwarranted leap, particularly in the complete absence of any violations of Section 8(a)(1) of the Act.

In order to assess its real significance to this case, the conversation between Zylkes and Swanson must also be placed in its proper context. Swanson was only responsible for hiring in the instrument department at Port Hudson/Georgia Pacific. Before recruiting or hiring anyone, Swanson first obtained approval from Project Manager John Brooks to hire additional personnel. Once hiring was approved, if he had not already done so, Swanson began to look for people to fill the position(s). Because it was common practice for long-term Brown & Root employees to move from job to job, Swanson regularly called other Brown & Root jobs to determine if there were any employees who were going to become available and would be interested in working at Port Hudson, describing the work, pay, and expected duration of the job. If he was unsuccessful in obtaining someone to fill the position, he then canvassed other managers and foremen on his jobsite to learn of any candidates that they might recommend. In this manner, Swanson filled every position in the instrument department with former Brown & Root employees, people who he knew personally, or someone who was recommended by someone else working for Brown & Root. Swanson testified credibly that for reasons explained below, he never even knew any of the alleged discriminatees had applied for work, and therefore never considered nor rejected them as applicants.

The only other effort at demonstrating union animus was Zylks' contention that at the Gonzales employment office, a piece of union literature which he placed on a bulletin board was removed while other non-Brown & Root material remained. The weight of credible testimony on this subject, however, including Zylks' own notes, does not support important details of his version.

Zylks testified that he posted a union flyer on the bulletin board hanging on the wall at Respondent's Gonzales employment office. Following a conversation with Widemire concerning the advantage of having a union, Zylks told Widemire that he had posted the union flyer on the wall. According to Zylks, Widemire then told Zylks the flyer would be removed because the company did not permit individuals to post anything in the company's premises. According to Zylks' testimony, on the same bulletin board, there were also ads posted for apartment rentals and a vehicle for sale, in addition to a large Brown & Root poster. I have serious doubts about one very important portion of Zylks' testimony concerning this incident, which I am now convinced represents gratuitous embellishment by Zylks.

Zylks has been a union organizer since 1992, a paid full-time organizer since July 1995, a veteran of several union salting classes, and a veteran of numerous unfair labor practice proceedings, including about 10 Board trials. Zylks had developed a custom, which he followed on 15 to 20 occasions, of making a tape recording of his visits or telephone conversations with Brown & Root personnel throughout 1998. No tape recording was offered of this conversation with Widemire. Zylks also made extensive notes. Zylks' notes of this incident do contain a reference to posting a union flyer and Widemire saying that he intended to remove it, but this part of the conversation is undisputed. Zylks' notes speak of "a (rental house) (apartment) (motel room) lease and a job logo chart." Significantly, there is no reference, however, to any vehicle for sale.

Widemire testified credibly that he had placed a bulletin board in the open area close to the front window, where applicants would receive and return applications, for the purpose of putting advertisements for lodging. Widemire testified credibly there were "quite a number of people that were coming in from out of the area, that were looking for a place to stay, trailer courts, apartments, those types of places, places—people that had a place to rent." In late February, Zylks came to the employment office and told Widemire that he had placed one of the Union's flyers on the bulletin board. Widemire said "that we didn't allow anything up there besides just places to stay." Widemire admits telling Zylks that he would remove it. Widemire testified that the only persons who were permitted to place anything on the bulletin board were Widemire and, occasionally, office clerks Tammy Allgood or Rachael Jordan. Widemire testified credibly that other than Zylks' union flyer, there were no other items on the bulletin board which were not directly related to business. Widemire specifically denied there was any ad for an automobile.

Scott Marshall, who worked in the same office, testified credibly and corroborated Widemire that the only postings on the bulletin board, other than the union leaflet, concerned housing accommodations for the many transient construction workers who needed some place to live while working in the area for Respondent. I agree with Respondent this lodging information is clearly job related to a large construction project that draws hundreds, if not thousands of transient workers.

In conclusion, I find that these two incidents, i.e., Swanson's ambiguous remarks to Zylks and Widemire's taking down the union leaflet from Respondent's bulletin board, in the absence of other independent violations of Section 8(a)(1) of the Act, do not rise to the level of demonstrating union animus on Respondent's part. Thus, if animus and discrimination is to be found, it must be solely from the fact that Respondent did not hire any of the alleged discriminatees.

C. The Port Hudson/Georgia Pacific Project

On the Georgia Pacific project in Port Hudson, during the relevant time period, John Brooks was the project administrator; Clifford (Buddy) Partin the electrical foreman; and Robert Swanson the instrument general foreman.

As described in detail below, at the personnel/hiring office in Gonzales, which staffed the Shell, BASF, and Vulcan projects, a conscious effort was made to follow Respondent's formal field hiring procedure. At Port Hudson/Georgia Pacific, however, a much less formal procedure was followed. Prior to April 1998, neither Partin nor Swanson had any training in, or knowledge of, this field hiring procedure. For Partin and Swanson this was their first occasion to hire personnel, and each relied on their own past experiences with Brown & Root. Although neither were aware of the formal, written hiring policy, both were aware of the general practice of hiring former Brown & Root employees whenever possible. Indeed, both testified it was very typical for Brown & Root employees to move from job to job. Although he was a long-term employee, Partin had never even completed an application for employ-

ment with Brown & Root. Swanson last completed a Brown & Root application in December 1989, despite being laid off and rehired by the company multiple times between 1990 and 1997.

It is undisputed that at Port Hudson/Georgia Pacific, Project Administrator Brooks received job applications and filed them, but did not participate in either the electrical or instrument departments' hiring decisions. Partin was solely responsible for hiring in the electrical department. Swanson was solely responsible for hiring in the instrument department. Further, it is undisputed that neither Swanson nor Partin was involved in any way in hiring for each other's department. There is not even a suggestion of union animus expressed by either Brooks or Partin.

On January 19, 1998, alleged discriminatees Andras Aycock, Richard Bailey, Benjamin Barnette, Joseph Berthelot, Kelly Browning, Kelly Gauthreaux, Thomas Gibson, James Loupe, and Clifford Zylks applied for work at the Port Hudson/Georgia Pacific project. On January 21, Leslie Carter applied. On February 24, Mike James, Gregory Lavergne, and Palmer Picard applied. And on March 17, Ed Smart applied.

At both Port Hudson and the Gonzales employment office, the uniform procedure was to file employment applications according to the craft indicated in the "Position Applied For"—"First Choice" block on the application. The applications submitted by the alleged discriminatees at Port Hudson uniformly list "electrician" in the "First Choice" block. The uncontradicted and, indeed, unchallenged evidence is that all of the applications filed by alleged discriminatees at Port Hudson were filed as electricians—and therefore would have been considered only by Partin if they had been considered at all.

D. Port Hudson Electrical Department Hires

Dennis Andrews was hired into the electrical department as an electrical helper on January 19, 1998, by Partin's supervisor, the project manager. Andrews was referred by his father-in-law, who was another of Respondent's project managers at a different location. This hiring decision was made before the first group of alleged discriminatees appeared on January 19.

John (Matt) Walker had worked at Georgia Pacific-Port Hudson in 1997 as an electrical helper. Walker approached Partin in the parking lot before mid-January inquiring about a job. Partin knew Walker from his previous work with Brown & Root. Partin told Walker to return in a week or two and he would hire him then as an electrical helper. Partin hired Walker on January 26 without seeing an application. On January 28, Partin hired Donald Cavalier as an electrical helper. Partin also knew Cavalier from previous work with Brown & Root.

Ronnie Temple had been hired December 1, 1997, as a millwright helper for Brown & Root at the Port Hudson facility. He was going to be laid off when the Brown & Root millwright general foreman, Dale Parker, learned that Partin could use another electrical helper. Partin permitted Temple to transfer into the electrical department on the same day (February 2, 1998) he was laid off from the millwright department.

Wallace Justus was hired by Partin based on a recommendation from Guy Ainsworth, another Brown & Root supervisor whom they both know and with whom they had both worked. Ainsworth recommended Justus after Partin commented that he needed an electrician. Thomas Ramey, another former Brown & Root employee, was hired on February 9, 1998, following a chance meeting between Partin and Ramey at a store on their way to their separate jobs. Partin, because of his recollection of Ramey's history with Brown & Root, namely, having separated from the Company with a notation about attendance in July 1994, advised Ramey that if he returned to work but "didn't have a good attendance record, he would be looking for another job." Ramey explained that his previous problem, that of a difficult divorce, and of which Partin was already aware, had been resolved.

The second-to-last hire by Partin in 1998 was Deshane Collier, who was recommended by a current Brown & Root employee, Glenn Ford. Partin hired him as an electrical helper on February 18, 1998. Scott Houston was the last electrician hired by Partin. Houston was hired through the recommendation of Dale Parker, Brown & Root's millwright general foreman at Port Hudson.

Partin followed the only practice he knew in hiring personnel. Partin's record of hiring shows that all eight of the persons he hired, Andrews, Walker, Cavalier, Temple, Justus, Ramey, Collier, and Houston, were either current or former Brown & Root employees or were recommended by current Brown & Root supervision or employees. This pattern parallels exactly the preferences established under Respondent's field hiring procedure, a fact which I find significant as described below. Partin testified credibly that despite the fact there were some applications for electricians on file in Brooks' office, he never even bothered to look at any applications in making his hiring decisions. Partin did not even know that there were applicants who were union supporters.

E. Port Hudson Instrument Department Hires

While Brooks had alleged discriminatees' applications in the cabinet drawer in the electrician folder, there were no applications in the instrument folder. Uncontradicted testimony shows that at both Port Hudson/Georgia Pacific and the Gonzales employment office, applications were classified and filed by the craft of first choice. Because of the way the applications were filed, none of the alleged discriminatees were known to, or passed over by, Instrument Fitter Foreman Swanson. Indeed, Swanson testified credibly that following the taped telephone conversation with Zylks, described in detail above, he looked for Zylks' application but did not find it.

A review of the people Swanson did hire shows that he, like Partin, followed the common practice of hiring former Brown & Root employees when available, and, when not, giving preference to applicants personally recommended to him. Cassandra Shankle-Stimac was hired as an instrument helper on January 29, 1998. Swanson's boss, Johnny Sepulveda, the project manager, knew that Shankle-Stimac was a good worker who had previously worked for Respondent. Thus, Swanson's first hire was recommended by his superior.

Marshall Miller was hired on February 19, and Nora Miller, his wife, on February 9, 1998. Marshall Miller had a long work history with Respondent. Swanson testified credibly that Nora was a "package deal" with her husband, and both were offered jobs as early as Christmas 1997.

Swanson next committed to hire Jason Baker some time in January 1998. Swanson's project manager instructed him to hire Baker, explaining that Baker's father was a manager for Brown & Root's client, Georgia Pacific. Baker had journeyman experience as an instrument fitter with other contractors, and Swanson hired Baker. After Swanson hired Baker, he asked Baker to recommend other instrument fitters in the area, and Baker promptly recommended John Fortenberry, with whom he had worked.

Before Swanson was assigned to the Port Hudson job, he worked at Brown & Root's Shell-Norco, Louisiana job. Swanson made a purposeful effort to meet and observe techs working at Shell. Kelly Blake impressed Swanson, and he approached Blake in the first week of January 1998 to work at Port Hudson as soon as the Shell-Norco job to which he was assigned was completed. Blake accepted the job offer and, as was the case with Marshall Miller, was accompanied by his helper-spouse, Laura Blake. Swanson also knew Laura Blake, having worked with her in an instrumentation department of another contractor approximately 5 years earlier. These hires were entirely consistent with Swanson's previous experience, i.e., hire people with whom you have worked and with whom you are familiar, or those who are recommended by jobsite management.

Partin's and Swanson's hiring practices both show that even without specific training regarding Respondent's formal field hiring procedures, the common practice was to give first preference to former Brown & Root employees, and, when they were not available, to then hire whenever possible someone who was recommended either by jobsite management or by another Brown & Root employee. In Swanson's case, Marshall Miller, Kelly Blake, and Blair were current or former employees of Brown & Root. Shankle-Stimac, Nora Miller, Baker, Laura Blake, and Fortenberry were all recommended by supervision or current employees. While Respondent's formal field hiring procedure was not consciously in play, all but one of every hire made by either Partin or Swanson fell into the "preferred" categories described by this procedure. This evidence convinces me that Respondent's practice of giving preference to certain types of applicants has been in place and applied for years, having nothing whatever to do with trying to exclude union applicants, and everything to do with trying to maintain a reliable core of quality employees upon whom it could depend.

Swanson was asked on cross-examination why, after speaking with Zylks, did Swanson not offer him a job. Swanson credibly answered: "Because [his] application wasn't in my file." Zylks had completed an application listing "electrician" as his first choice. Therefore it was filed with other applicants for the electrical department. Swanson's Brown & Root experience in instrumentation was treated as a wholly different craft from the electrical department. Swanson testified credibly, answering questions from all parties and the court in a forthright and deliberate manner. When he testified last, he was no longer even an employee of Brown & Root, and had no plan to return to work for Brown & Root.

I find, based on the facts described above, that neither Partin nor Swanson discriminated in any way based on union activity in making their hiring decisions.

F. The Gonzales Employment Office

In September 1997, Brown & Root established an employment office in Gonzales, Louisiana, for the purpose of staffing various upcoming projects in the area, including Shell, and later BASF and Vulcan.

In October 1997, Louis Widemire was assigned to run the Gonzales office. Widemire had considerable experience as a recruiter for Brown & Root. Before Widemire's arrival, relatively little hiring had occurred because the Shell project was just beginning. There were superintendents and management staff on the job, along with no more than fifteen craftsmen. In November 1997, Widemire began to hire rodbusters, concrete finishers, and carpenters. By the end of the year, there were approximately 30 craftsmen on the Shell job. The great amount of hiring for Shell, over 2000 people, occurred in 1998.

Brown & Root had not had a significant presence in the Gonzales/Geismar area for at least 5 years before it opened the Gonzales office. Respondent utilizes multiple resources to staff its projects, and each one was used in the Gonzales office. The most common method of obtaining employees was to use two kinds of supervisor referrals. First, supervisors assigned to the new project referred people with whom they worked, or knew, or were recommended by trustworthy sources. The second were referrals from supervisors at other jobsites. It was common to recruit former employees who the Company's computer showed had been recently laid off at other Brown & Root projects.

Respondent also used its second most common method of staffing a project of this size—mass mailings to former employees. In March 1998, Respondent mailed postcards to all former Brown & Root employees with a permanent address in Louisiana, not just to any specific crafts. Approximately 10,000 to 12,000 postcards were mailed out. The decision to use a mass mailing of postcards at Gonzales was made by Rick Hopper, corporate personnel director, in consultation with Shell Project Field Superintendent Andy Johnson, and was based upon the upcoming work in the Gonzales area. Widemire was not consulted concerning the need for this mailing, and was simply notified when the cards were going to be sent.

Along with the other recruiting methods described above, Respondent also networked with area human resources directors, attended community job fairs, and contacted the local job service offices. It used advertisements in newspapers and construction-industry periodicals that list itinerant job opportunities.

G. Respondent's Hiring Policy and Procedure

Considerable evidence was offered concerning Respondent's field hiring procedure, and the manner in which it was implemented. This policy describes the application process and a formal system of preferences which Brown & Root accords various groups of applicants. Pursuant to this policy, Respondent gives preferential hiring consideration to two groups of employees: (1) current and former Brown & Root employees, and (2) prospective employees recommended either by supervisors or by other employees. There is no question that this procedure, and the preferences it accords, is designed to provide continuous employment opportunities to current and former

Brown & Root employees and to encourage current employees and supervisors to recommend candidates.

Pursuant to the hiring procedure, the actual practice which has developed is for job superintendents, general foremen, and foremen to submit "requisitions for labor" to the personnel/hiring office which often have names already filled in for some or all of the people to be hired for particular openings. When this happens, any named individual, referred to as a "by-name requisition," is offered the position, whether or not they are a current or former Brown & Root employee. For those positions that do not already name the person to be hired, preferential consideration called for by the field hiring procedure is given to former Brown & Root employees.

Scott Marshall testified credibly that when a job requisition was received in the employment office with someone's name already placed on the form, and came that way after having been approved by the project manager, the personnel office uniformly offered the person named a job. Counsel for the General Counsel was asked whether that was an issue which he disputed, and he stated he did not. Counsel for the General Counsel conceded there is no allegation, no evidence to suggest, and no argument that the priority given to "by-name requisitions" was in any way discriminatory.

Nor does counsel for the General Counsel argue that the field hiring procedure, and preferences it accords, is per se unlawful. In addition to the various hiring preferences described in the field hiring procedure, this procedure also provides, "Application files will be reviewed monthly and new hire applications that exceed the thirty (30) day active status will be pulled and placed in an inactive file." The field employment application itself informs new applicants: "Notice To All Applicants: Applications will be active for 30 days or duration of project; whichever is shorter." Testimony from the Gonzales employment office staff, including Allgood, Jordan, Marshall, Widemire, and Chruma, was consistent and credible that this policy was followed uniformly, except to the limited extent described below.

First, the rule as spelled out in the field hiring procedure applies only to "new hire applicants." The rule does not apply to former Brown & Root employees, whose applications remain active throughout the duration of any particular project for which they apply. Second, the procedure as described does not direct that the files be purged on a particular day of the week, or date of the month, or that it be done on the same day of the week or the same day of each month. Consequently, depending upon the particular circumstances of each employment office, some variance occurred. For example, office personnel might pull applications in early or mid February and not again until the end of March, which could permit an application to remain in the active file almost as long as 60 days. While the application remained in the active file, it was reviewed along with all others in the file without distinction. However, once an application was removed to the inactive file, it was not reviewed or considered again unless the applicant renewed the application. Reactivation was noted by stamping the application as reactivated and entering the date. If, however, as sometimes did happen, the applicant returned to reactivate his/her application and the recruiter made a decision at that time to hire the applicant, no purpose was served to stamp and date the application.

H. Shell Project Hires

"Requisitions For Labor" at the Shell project were generated from jobsite management listing the number of vacancies in a particular class code that needed filling. They often named the specific person whom the department supervisors, with project manager approval, wanted to be employed. These "by-name requisitions" were the ones most quickly filled by the Gonzales employment office because they required much less work than others did. They eliminated the need to find a candidate and in effect removed decision making from the employment office.

In early January 1998, the Gonzales employment office was staffed by Widemire and a clerical. A second clerical was added, and a recruiter, Scott Marshall, was hired in early February. Widemire was responsible for employing the great bulk of the people for the Shell construction project. The project was to build a polymer plant from the ground up. From January 1, 1998, through May 15, 1999, almost 2300 people would be hired on this project. This total did not include approximately 875 other individuals who were made offers of employment, and for a great variety of reasons, did not go on the active payroll. An average of over 190 people per month were hired or made offers at Shell Chemical.

The first alleged discriminatees applied at the Gonzales employment office on January 20, 1998. Before that time, four employees had already been hired and one other had been made a commitment for the electrical department at the Shell project. Annie Byers was a "by-name requisition." Merle Fontenot was a former Brown & Root employee. Steve Holton was hired to fill a foreman position as soon as staffing levels permitted. Jason Burns happened to make a very favorable impression on Widemire, and was hired when those with preferential, second or special consideration either were unavailable, had not shown for an interview when it was scheduled, or, in the case of one, had created a negative impression in the interview. Michael Cook, who was offered a position but not able to report until early February, was referred by a current employee, and thus qualified for "second consideration" pursuant to Respondent's hiring policy.

Almost 300 people applied for work in the first 19 days of January 1998. More than 60 labor requisitions came from the field. Electricians, however, were not high priority. Widemire was concerned with staffing supervisory positions and other crafts, particularly concrete finishers, carpenters, rodbusters, clerks, and warehousemen. Of course, he knew there would be a need for electricians later but, as the requisitions indicated, it would not be until another 14 requisitions were received, with 41 positions to fill, that the 15th requisition would request another electrician.

On January 19, 32 people applied for work and 15 people were hired. The following day, 12 people submitted applications, including alleged discriminatees Berthelot, Gauthreaux, and Zylks. Widemire was at lunch when those three came in. On January 21, 27 people submitted applications, including alleged discriminatees Aycock, Barnette, Beauchamp, Carter,

Chevalier, and Hargrove, each of who identified himself with the Union.

On January 22, 23 applied. Nine of these were alleged discriminatees: Bailey, Browning, Gibson, Guarino, Loupe, Picard, Sheehan, Terrio, and Wade. On January 26, 44 applicants arrived including alleged discriminatees Brown, Lovett, D. Overmier, P. Overmier, T. Overmier, and Stevens. Additional requisitions had arrived, none for electricians.

Widemire explained that between the commitment to hire Cook and his actual reporting date scheduled for early February, he spoke to Cook. Cook told Widemire that he had a friend, James Brady, who was on the same job as Cook, and Cook wanted Brady to come also. Thus, Brady came in with Cook on February 10. Widemire looked at Brady's application, saw what he considered recent, relevant experience and made the decision on the spot to hire Brady. Widemire candidly admits he did not review any of the other applications that might have been on file—whether or not filed by union applicants. Widemire followed the simple expediency of hiring someone who came recommended to him, was immediately available, was qualified, and could "fill that spot" without consuming any further of his time or effort.

Widemire knew what other applicants were available to him because he had already looked at the applications and the applicants' qualifications, mentally scoring them, at or about the time their applications were received. Widemire testified credibly that as applications arrived, he evaluated every application before it was filed, although sometimes briefly. Widemire explained that in evaluating these applications, he was looking for a certain specific type of experience, i.e., experience in heavy industrial electrical installation. He was not looking for, and in fact discounted applicants who had residential, commercial, or nuclear power plant experience because that work was very different from the kind of duties being performed at Shell. Widemire Testified:

> [W]hat I'm looking for, primarily, besides current Brown & Rooters that are just coming off of another Brown & Root project, when I speak the term recent relevant experience, I'm looking for people who have been doing recently something that's the same type of work that is relevant to what they're going to be doing here, both for safety and training reasons, and also for just general knowledge.
>
> . . . .
>
> If they've been doing residential work, that doesn't mean anything to me; it's not relevant to what we're doing.
>
> . . . .
>
> My experience over the past years with Brown & Root, commercial doesn't mean anything to me at all. In fact, it's a big negative to me personally because some of the worst—pardon my saying it—butt-chewings I've ever gotten were from hiring commercial people onto a project . . . .
>
> . . . .
>
> So when I see commercial or residential or nuclear power experience, it just does not mean a whole lot as a first choice; it just puts them in a lower category; I downgrade them mentally. *So what I'm looking for is recent relevant experience that's heavy industrial electrical work doing the setting up conduit; putting in cable trays; pulling heavy, heavy wire that's going to generate thousands of volts of electricity, not just 110 or 220 or 480—about 7,500 volts or 10,500 volts of electricity; that's the type of experience.* [Emphasis added.]

Widemire candidly explained the manner in which he analyzed the applications of alleged discriminatees. On January 20, Joseph Berthelot was among the first to apply at the Gonzales employment office. Berthelot reactivated his application once, on February 20. Berthelot's application indicates that he had never worked for Brown & Root, and was not entitled to a preference under the field hiring procedure. Widemire testified credibly that while the application shows Berthelot is an electrician with many years of experience, there is nothing to indicate he had any experience doing the type of work being done by Respondent on the Shell project. Under the "Previous Employment" section, Widemire did not recognize Louisiana Electric as a company "doing the same type of work that we're doing." There was nothing on his application which indicated to Widemire that Berthelot had "been doing heavy industrial electrical type work in pulp and paper, chemical or petroleum type plants which is what I'm primarily looking for at this time."

Kelly Gauthreaux also applied on January 20, and reactivated his application twice—on February 2 and 26. Gauthreaux was not a previous Brown & Root employee, and not entitled to any preference under the field hiring procedure. Gauthreaux had worked with Buffalo Electric, a company with which Widemire was not familiar, and at the "G. P. Papermill." This fact piqued Widemire's interest and the length of time there, February 1997 to January 1998, would be a credit to Gauthreaux. This was an application of somebody whom he would favorably consider. The Charging Party asked Widemire why he did not call Gauthreaux for an interview. Widemire explained that there was relatively little need for electricians at that time. As discussed in greater detail below, after January 20, only one electrician position was available in February, four in March, and one in April. Hiring activity for other crafts, however, was so frenzied that there was simply no time to interview applicants unless Widemire was trying to fill a specific opening.

Clifford Zylks also applied on January 20, along with Berthelot and Gauthreaux. Zylks reactivated his application numerous times, as discussed in detail below. Zylks applied as an electrician, and his application was coded as an electrician, but his employment from June 5, 1995, to the present was shown as working for "IBEW LU 995." The previous electrician's work history shown was from September 10, 1994, to June 4, 1995, as "electrician doing electrical work (plant)." Widemire interpreted the applicant "as not actually being on his tools" for the previous 2-1/2 years. With a gap of 2-1/2 years since last being on his tools, Zylks was not "attractive as a potential applicant . . ."

Andras Aycock applied on January 21, and reactivated his application twice—on February 18 and again on March 2.

Aycock was a former Brown & Root employee, which put him in the category for preferential consideration. Aycock's application showed that since 1994, he had worked in December 1997 for Gulf Electric Company as a journeyman wireman that, to Widemire, means "stringing wire between telephone poles." Aycock's work at Quality Electric of Baton Rouge as a journeyman wireman on a trouble truck was equally unimpressive to Widemire.

Benjamin Barnette applied on January 21, and then reactivated his application on May 1. Barnett was not a previous Brown & Root employee, and not entitled to any preference under the field hiring procedure. None of the work shown in his prior experience was what Brown & Root was doing at Shell Chemical. Widemire testified credibly that nothing on his application made Barnette stand out to him as a particularly impressive candidate, so his application simply went into the file cabinet with other non-Brown & Root applicants.

Donald Beauchamp applied on January 21, and reactivated his application once on February 25. Beauchamp was not a previous Brown & Root employee, and not entitled to any preference under the field hiring procedure. Widemire saw that Beauchamp worked at a nuclear power plant between October and November 1997 and at another nuclear power plant from January 1994 to October 1997. Thus, for the last 4 years, his experience had been irrelevant to Brown & Root's needs, and Widemire looked no further.

Leslie Carter applied on January 21 and never reactivated his application. Carter was not a previous Brown & Root employee, and not entitled to any preferential consideration under the field hiring procedure. In the previous employment section of the field employment application, Carter indicated that he was employed from October to December 1997 at Witco in Harvey, Louisiana, for Fluor Constructors International, Inc. Widemire testified that he didn't "really know what Witco is—that doesn't ring a bell as any type of company. He was there for a couple of months as an electrician, but he doesn't say what his duties were." From August to October 1997, Carter was working for VIS at Rubicon, and indicated on his application that he was involved in plant maintenance. At another employer listed on Carter's application, "DTEK, Inc., Carter was working at the Chevron facility in St. James Parish as an Aelectrician and instrument" in the type of business which is relevant to Brown & Root's activities, particularly because the Chevron plant is a petrochemical facility. Widemire's assessment of Carter's application was "this would be somebody I might consider at a later time, but there is nothing here that really stands out, piques my interest for consideration at this time."

Ronald Chevalier applied on January 21, and reactivated his application once on March 10. Chevalier was not a previous Brown & Root employee, and not entitled to any preference under the field hiring procedure. Chevalier's application indicated that he was working from October 1997 to the time of his application for Wye Electric in Livingston, Louisiana, at the Ligo project. Widemire was not familiar with Wye Electric or with the Livingston, Louisiana Ligo project, though Chevalier was running conduit, pulling wire and terminating switch gear which was similar to what Brown & Root was doing at the Shell Chemical project. Prior to Wye Electric, Chevalier worked from August to September 1997 at the nuclear power plant in St. Francisville, Louisiana, for Stone & Webster. Then, before the nuclear power plant work, between November 1996 and February 1997, Chevalier worked at the Exxon refinery running conduit, pulling wire, and terminating, all of which would make Chevalier "somebody that I definitely might would consider, . . . Exxon would pique my interest; Stone & Webster would not with Riverbend Nuclear Power Plant there; and Wye Electric, I don't know anything about it. So just looking at it quickly, it is kind of a mixed bag, but he is certainly somebody that would be considered."

Frank Hargrove was the last to apply on January 21. Hargrove, who never reactivated his application, was not a previous Brown & Root employee, and not entitled to any preferential consideration under the field hiring procedure. Widemire's assessment of Hargrove's application was that although he indicated he was working at a paper mill, it was for less than a month as a "journeyman wireman" for Nevers Electrical Contracting, another company with which Widemire was not familiar. From the application, Widemire did not know exactly what kind of work Hargrove was doing at the paper mill. Thus, Hargrove "didn't really stand out as somebody that I would—that would really stand out to me at this time."

Richard Bailey applied on January 22. He later reactivated his application on February 23, March 2, April 1, and May 1. Bailey was "a previous Brown & Root or associated company employee" having worked for "MidValley Construction—Georgia Pacific 1970's." Widemire testified credibly there was no record of Bailey in the company's computer system "and probably, in that there is no record, he [Bailey] probably would have ended up filed in the non-Brown & Root file; that is a long time ago [referring to Bailey's experience in the 1970's]." From July to December 1997, Bailey worked in "Shop B. R. La." for Louisiana Electric. Bailey's job title and duties were listed as: "Electrician—trouble cause/maintenance." That description of work, according to Widemire, did not say anything about what type of work Bailey had actually been doing, so Widemire went to the resume which was noted by Bailey as being attached on the field employment application. There, the first line under "Work Experience" stated that from 1991 to present he had been working in "Industrial/Commercial Work for several area contractors," and listed those contractors. It then continued by stating that he was engaged in "Commercial construction & remodeling for several out-of-state contractors" and also involved in "Outage work" at a nuclear powerhouse. Widemire summarized his impressions as follows:

> [H]e's stating that he has worked for us before, so we tried to look him up and find whether he had a record with us which we could not find; it [application] shows me five months working in a shop doing trouble calls and maintenance; and then on his resume it says industrial work but I don't see anything there that states that he was working in an industrial plant like what we are going to be doing; and then he says commercial construction and remodeling. There is nothing there that makes him stand out at this time.

Kelley Browning applied on January 22, and reactivated his application on February 23 and April 3. Browning was not a previous Brown & Root employee, and not entitled to any preferential consideration under the field hiring procedure. In the "Previous Employment" section of his application, Browning first listed that he worked from October to November 21, 1997, for Babcock & Wilcox at Big Cajun (which Widemire understood to be a nuclear power plant). Prior to that, he worked at Stone & Webster at the Riverbend Nuclear Power Plant from September to October 1997. Seeing those two nuclear power plant experiences, Widemire would not set this application aside for further review.

Thomas Gibson applied on January 22. He later reactivated his application on February 23 and March 2. Gibson was not a previous Brown & Root employee, and not entitled to any preferential consideration under the field hiring procedure. The only work indicated in the previous employment section of Gibson's application was from January to October 1997 for Stone & Webster at the Riverbend Nuclear Power Plant. As a consequence, Widemire would have simply put Gibson's application in the file drawer for non-Brown & Root applicants, and given it no further serious consideration.

Thomas Guarino applied on January 22, later reactivating his application three times—February 20, March 23, and May 5. Guarino was not a previous Brown & Root employee, and not entitled to any preference under the field hiring procedure. Guarino's application showed his most recent employment being from August to November 1997 with Stone & Webster Construction Company at the St. Francisville Nuclear Plant. Considering Widemire's experience with nuclear power plant employees, both Brown & Root and non-Brown & Root, as noted hereinabove, he was not impressed with this recent experience. Further, Guarino worked between July and August 1997 for Remco Electric Contractors in Detroit, Michigan, but did not indicate on his application what kind of plant in which he was working. The work location prior to that was also in Detroit for Hall Engineering Company where he described his job title and duties as: "Reworking a power plant." As Widemire testified, the work shown on Guarino's application was "not close to what we are doing here." Thus, Guarino would have been discounted for any further serious consideration.

James Loupe applied on January 22. Loupe was a previous Brown & Root employee, having worked from September 13 to September 16, 1994, at the Georgia Pacific-Port Hudson facility. Thus, even though Loupe's previous employment was only for 4 days, he nevertheless was entitled to preferential consideration under Respondent's field hiring procedure. As was customary with those individuals indicating previous Brown & Root employment history, a job summary was printed. Loupe's job summary also indicated employment for 2 days in September 1996. As a former "Brown & Rooter," he was retained in the Brown & Root file and was given consideration right away. In reviewing the previous employment activities, however, Loupe did not impress Widemire since the work described was for Louisiana Electric as "pole climber." This description led Widemire to believe that Loupe had been pulling wires between telephone poles for almost all of the past 2 years. Between March and June 1996, Loupe had worked at Earl K. Long Hospital "remodeling offices"—obviously commercial work. Widemire's reaction to Loupe's application was stated as follows:

> So yes, he has worked for Brown & Root before so we would give him preferential consideration, but there is only three days on one job and two on another, and everything he has done since then is not anything close to what we are doing now, so I would put him in with the other Brown & Root applications to keep them active during the whole project, but at this time there is nothing there that would make him more attractive to me at this time.

Palmer Picard applied on January 22, and reactivated his application on February 23 and March 2. Picard was not a previous Brown & Root employee, and not entitled to preferential consideration under the field hiring procedure. Picard's application lists three companies for which he had worked as an electrician in Memphis, Tennessee, and Baton Rouge, Louisiana, but there was no indication on the application of what he had been doing—whether it was residential, commercial, or industrial—or the type of plants in which he had been working. As Widemire candidly states, there was nothing on the application or the attached resume that would lead Widemire "to take much of a second glance at it for any type of recent relevant experience."

Gerald Sheehan applied on January 22. He later reactivated his application on March 9 and April 16. Sheehan was not a previous Brown & Root employee, and not entitled to any preference under the field hiring procedure. Sheehan listed three employers in the previous employment section of his application, two of which were in St. Louis, Missouri, and none of which Widemire recognized. The most recent employer was "Frishhertz Elect" in New Orleans, where Sheehan listed his job titles and duties as "electrician comm[ercial] & industrial const." Widemire testified credibly that this description of job title and duties, which was the same for the other two employers, did not tell him what kind of work Sheehan was actually doing. Therefore, as Widemire candidly admitted, "there is nothing here to look farther—that tells me to look farther at this time." Widemire simply filed the application with other non-Brown & Root applicants.

Curlin Terrio applied on January 22, and reactivated his application on February 17 and March 2. Terrio was not a previous Brown & Root employee, and not entitled to preferential consideration under the field hiring procedure. Terrio listed his most recent job as a boilermaker for Babcock & Wilcox in December 1997, and for the month prior to that, November 1997, he listed working in New Roads, Louisiana, for Standard Electric repairing equipment in "precipitator houses." From May 1991 to October 1997, Terrio listed employment with Stone & Webster in Athens, Alabama, and St. Francisville, Louisiana, both at nuclear power plants. Widemire concluded: "So I don't think I would look at Mr. Terrio very seriously for long at this point in the hiring phase."

Clarence Wade applied on January 22. Wade, who never reactivated his application, was not a previous Brown & Root employee, and not entitled to any preference under the field

hiring procedure. Wade's previous employment from October 29 to December 24, 1997, was with WA Pope Company in Rockford, Illinois, but Wade did not describe the kind of work that he had been doing. Wade also stated he worked for Stone & Webster from July 1995 through October 1997, with a 4-month break between February and June 1996. Again, Wade did not describe his duties other than to say that his job titles and duties were "electrical work." As Widemire testified, "I don't see anything there that would make him stand out."

David Brown applied on January 26, and reactivated his application once on March 12. Brown was not a previous Brown & Root employee, and not entitled to preferential consideration under the field hiring procedure. Brown's previous employment in the month of December 1997 was with Nevers Electric Company at Bogalusa, Louisiana, where Brown "performed electrical plant construction." Brown stated that prior to working for Nevers Electric, he worked for 2 months from November to December 1997 with Fluor Constructors in Laplace, Louisiana. Widemire presumed this was probably one of the refineries in Laplace, but Brown did not describe what he was doing.

Garry Lovett applied on January 26, and never reactivated his application. Lovett was not a previous Brown & Root employee, and not entitled to any preference under the field hiring procedure. Lovett is another applicant who worked in December 1997 for Nevers Electric at Bogalusa, Louisiana. Like many of the other alleged discriminatee applications, he did not give any detail of the type of work which he was performing, choosing instead to simply note in the block for job title and duties: "electrician (union)." Lovett also worked for Standard Electric in New Roads, Louisiana, and almost 5 years at Baton Rouge General Hospital which would be "commercial, hospital-type experience." There was nothing on Lovett's application that caused Widemire to set it aside as one showing particular promise.

Daniel Overmier applied on January 26, and reactivated his application twice—on February 25 and March 23. Timothy Overmire also applied on January 26, but reactivated his application only once on February 27. Neither Overmier was a previous Brown & Root employee, and thus neither was entitled to preferential consideration under the field hiring procedure. Daniel Overmier worked for Nevers Electrical in December 1997 at Bogalusa, Louisiana, where he described his job title and duties as, "union electrician all types of electrical work." Daniel Overmier gave the same description of job title and duties for his previous employer from August to November 1997, when he was working with VIS Incorporated in Geismar, Louisiana. For both of these employers, Overmier did not describe what type of work he had been performing, so it was impossible for Widemire to determine whether it was relevant experience. Overmire's application shows that from January through May 1997, he worked at Schuylkill Metals Corporation in Baton Rouge, with job title and duties described simply as "electrical & instrument tech." Widemire was not familiar with Schuylkill Metals Corporation. Timothy Overmire's application was almost identical with regard to previous employment. Neither application described their actual duties performed in any detail, and Widemire simply filed them in the appropriate folder.

Patrick Overmier applied on January 26 and never reactivated his application. Patrick Overmier was not a previous Brown & Root employee, and not entitled to any preference under the field hiring procedure. Overmier described his job title and duties for each of the three companies listed as "journeyman, wireman, or inside wireman electrical work." Overmier's previous employers were Fluor Constructors from November 12 to December 3, 1997, at Little Gypsy in Laplace, which Widemire understood was one of the nuclear power plants in the area. Overmier's work for Gibson Electric Company in Deerfield, Illinois, and Unite Electric Company in Louisville, Kentucky, were with two companies with which Widemire was not familiar, and in neither instance did Overmier "tell me what type of plant it was or what he was doing."

Marvin Stevens applied on January 26 and never reactivated his application. Stevens was not a previous Brown & Root employee, and not entitled to preferential consideration under the field hiring procedure. Stevens, like several others, worked in December 1997 for Nevers Electric in Bogalusa, but did not describe his job title and duties beyond stating: "Electrician." In fact, that was the same description he gave for his job title and duties with the two other employers he mentioned in the previous employment section of his application, Fluor Contractors at Little Gypsy and Stone & Webster at Riverbend Nuclear Power Plant at St. Francisville, Louisiana, both nuclear power facilities. Widemire concluded that "there is nothing on Mr. Stevens' application that would make him stand out at this time."

The testimony of both Widemire and Marshall gave a very detailed explanation of the recruiting and employment process, and their testimony was not truly challenged. The Charging Party and counsel for the General Counsel, of course, attempted to highlight what they regarded as discrepancies, but this was not a persuasive effort. In fact, both Widemire and Marshall testified in a forthright and objective manner. Widemire testified to his assessment of the applications of alleged discriminatees, objectively noting their strengths as well as their weaknesses. Widemire used an identical standard and terminology in assessing the applications of others who are not alleged discriminatees, but who like them were not hired. Further, I take into account that in the case of Widemire, he last worked for Respondent in January 1999. Thus, throughout his testimony, he was no longer employed by Respondent. Further, Widemire testified credibly that he had no arrangement or expectation of future employment with Respondent.

At times I questioned the reason for Widemire's failure to interview "union applicants." Now that I have had a chance to consider the entire record, however, I agree that they were treated no differently than hundreds and hundreds of other applicants who were not interviewed. When asked why he did not interview any of the alleged discriminatees when they came in, Widemire testified credibly:

> As I stated in testimony earlier, the first three came in while I was out to lunch. The next day a large group came in at one time, and the next day another group came in at one time. I

> remember looking at their applications briefly and taking them all in, but I do not remember interviewing any of them individually.

After reviewing the record as a whole, it is clear that the sheer numbers that Widemire was dealing with permitted little time to interview crafts which he was under no pressure to hire. At the time the first alleged discriminatees applied, there were no unfilled requisitions for electricians. The next requisition for an electrician did not come until February 4, and even then only one electrician was needed. The record reflects that Widemire did not interview walk-in applicants at all unless there was a specific job opening which he was trying to fill. If there was a specific opening he was trying to fill, he sometimes met and talked to applicants as they were filling out applications. Otherwise, the most that he was usually able to do was review applications at the end of the workday and set aside for future reference those which, on their face, looked particularly appealing. In view of the volume of applicant flow and hiring, the fact that among the "union applicants" only Zylks had any extended conversation with either Widemire or Marshall is not surprising at all. Indeed, it is clear from the volume of applicants that interviews were the exception rather than the rule.

No electrician was hired from February 11 until March 11. There was, however, considerable hiring activity during that same time for positions other than electrician. After the February 4 requisition for one electrician was received, there were another 24 requisitions received requesting that approximately 140 nonelectrician positions be filled. The great majority of those requisitions were not "by-name requisitions." Consequently, the volume of work being done by Widemire and other people in the Gonzales office remained frenzied with processing applications, recruiting, hiring, and testing. It was during this same time that the volume of telephone updating had reached a point as to cause the office staff to become frustrated with that particular practice. There were days when the volume of applicant flow was such that neither Widemire nor Marshall could possibly interview applicants, or even review applications until the evening. As Widemire testified, there were many occasions, particularly when individuals came in a group, that it became impossible for him to interview applicants. Interviewing would be reserved for where there were immediate needs.

Soon after arriving at Gonzales, Widemire learned that his predecessor had initiated a practice of permitting applicants for employment to update their applications by telephone. This practice, at least insofar as Widemire and his predecessor were concerned, was not unusual, since they had permitted the same system when both were at another project in Maryland.

Following several months of permitting telephone updating of applications, in approximately mid-February 1998, Widemire had a telephone conversation with Rick Hopper, human resources director at Respondent's corporate headquarters, who regularly spoke to the recruiting managers that reported to him. During the course of the conversation, Widemire mentioned to Hopper that the applicant flow had picked up dramatically and that the clerical staff was a little flustered and edgy "because of the activity of people calling in to update applications over the phone." Hopper informed Widemire there was no reason to do that, that corporate policy states applicants should come in person to update applications Widemire responded, "Great. No problem. We'll stop it right now." Consequently, the practice of allowing applicants to update their applications by telephone ceased altogether. From that point on, the Gonzales employment office has followed official corporate policy that requires applicants to update their applications in person.

While Counsel for the General Counsel suggested during the hearing that the motivation for this change was improper, there is no allegation to that effect. Further, while the change in practice followed applications from union supporters, evidence shows the practice that had been allowed had become very burdensome on the staff. When the staff's grumbling about the volume of extra work entailed in their pulling applications and noting updates was mentioned by Widemire to Hopper, the incorrect practice was immediately ended and the practice called-for by the field hiring policy was followed. Timing is the only factor that even suggests that this change might have been motivated by union animus. In the final analysis, there is no reason to believe that Respondent's reason for the change was anything other than as it was presented, or that it could reasonably be viewed as preventing any of the alleged discriminatees from reactivating applications.

The next requisitions that included electricians were received at the employment office on February 19. One requisition sought three individuals, two of whom were "by-name requisitions," one a supervisor, and another a helper position. The third position was for an electrician. The other requisition sought eight persons, four of whom were electricians and the others helpers. Widemire had approximately 2 weeks to fill the first requisition and almost a month to fill the second. Consequently, as Widemire credibly testified, he continued to focus his primary attention "trying to get rodbusters mainly; that's the one craft that stood out big time. We could not find them anywhere."

During this same time period, five more alleged discriminatees applied for work at the Gonzales employment office. As he did with other applications, Widemire reviewed them before they were filed. Barry Curtis applied on February 17, and never reactivated his application. Curtis was not a previous Brown & Root employee, and not entitled to preferential consideration under the field hiring procedure. Curtis's application did not describe the type of electrical work that he had done at any of the three places of employment that he identified, Richmond, Virginia; Austin, Texas; and Chicago, Illinois.

Randall Curtis applied on February 25, and like Barry Curtis, never reactivated his application. Randall Curtis was not a previous Brown & Root employee, and not entitled to preferential consideration under the field hiring procedure. While his most recent place of employment was at the Mobil refinery in Chalmette, Louisiana, there was no indication as to the type of duties which he performed there, other than "wireman-electrical & instrument installation." Randall Curtis' two jobs prior to the Mobil refinery job were at the Little Gypsy Power Plant and the Riverbend Nuclear Power station. As indicated

above, Widemire considered nuclear power work as not being relevant to the Shell Chemical project.

James Carroll Carter applied on February 25, and never reactivated his application. Carter was not a previous Brown & Root employee, and not entitled to preferential consideration under the field hiring procedure. Despite indicating that he had worked in Chalmette, Louisiana, at an oil refinery, he did not describe the duties that he had other than to say: "electrician on electrical installation." In reference to his employment prior to the Chalmette work, from August to October 1997, Carter wrote that he was working in commercial construction. Prior to that, from November 1995 to March 1997, he worked for VIS at the Rubicon Geismar facility, but wrote that his work was "electrical maintenance," not the heavy industrial construction type work which was ongoing at Brown & Root's Shell Chemical project.

Gregory Lavergne completed an application on March 5. Lavergne was a previous Brown & Root employee entitled to preferential consideration under the field hiring procedure. Lavergne's application reflected work for two companies from June 1997 to February 1998 with Triangle Electric and Chemco Electric, both in Detroit, Michigan. The description of his job title and duties with both companies, however, was simply "journeyman electrician." Further, the company with whom he had been employed prior to the Detroit, Michigan assignments was Todd Electric, from February to June 1997, in Baton Rouge, Louisiana. Again, Lavergne described his job title and duties there as: "journeyman electrician." These descriptions left Widemire not knowing what Lavergne had been doing on those jobs or what he was building, if anything. On Lavergne's application, there was no indication of recent experience relevant to that which would be required at the Shell Geismar project, at least none which Widemire could identify. Because he was a former Brown & Root employee, Lavergne's application would have been returned to the file for future consideration for another position.

John James applied on March 9. James was a former Brown & Root employee and, as a result, his application remained active throughout the project. James worked from June until December 1997 for an employer in Austin, Texas, and described his job title and duties for this employer and the other two employers listed in the previous emmployment section of the application as: "electrician all duties of an electrician." With that type of description of job duties, Widemire was not able to discern what James had actually been doing for those employers, whether it was industrial, commercial, or residential. Widemire could assume that the work from August to September 1995 at the Georgia Pacific papermill was industrial but he had no way of knowing what type of work James had done with Friberg Electric at the papermill. Thus, James, while being entitled to preferential consideration as a former Brown & Root employee, did not show on his application any recent, relevant experience which would have caused Widemire to want to interview him at that time.

Since time was not of the essence to find electricians, Widemire was able to simply keep his eye open for people to fill those positions in the electrical department. He did so almost entirely with former Brown & Root employees. Widemire scheduled Steven Mitchell, Brian Nance, and Embry Shaw, all former Brown & Root employees who had worked for Respondent quite recently, for preemployment processing. Each was scheduled to complete their processing in requirements on February 23, but all three were "no shows."

Consequently, Widemire hired Ellery Brown on March 11. Brown was a former Brown & Root employee with recent experience similar to that being done on the Shell project. Achord, hired March 12, was referred by the electrical superintendent for the Shell Chemical project. Cage, hired March 16, was also a former Brown & Root employee. Gaona, hired March 17, was a former Brown & Root employee hired with an electrician classification but employed as a warehouseman, with recent experience in a similar position. Buitron, hired March 25, was also a former Brown & Root employee hired with an electrician classification but employed as a warehouseman, with recent experience in a similar position.

Danny Jones filed an application on February 23 and was hired March 18. Jones is the only person hired who did not fit the preferred categories described in Respondent's field hiring procedure. Jones arrived on the same day that Mitchell, Nance, and Shaw were expected, but failed to show. Widemire testified credibly he happened to be present as Jones filled out his application and noticed that Jones listed as the first choice for which he was applying "electrician" and second choice "carpenter," two crafts which normally do not go hand in hand. Widemire also noticed that Jones had obtained an electrical engineering degree from Nichols State University and, in speaking to him, observed that Jones was also a minority. A significant feature of Jones' application was the length of time that Jones had worked for Becon Construction, namely from December 11, 1996, to February 22, 1998, 1 year and 3 months. Widemire recalled his thoughts at the time and testified:

> I did not make him an offer at that time, but his application stood out to me just because of recent relevant experience, because I talked to him personally, and he had well over a year for a competitor, Becon, on one job. We were looking to hire people that would stay the whole job; this job still had a year to go at this time. And from all of the applications that I had seen up to this time, which—February 23 would probably have been in the hundreds. Most of the people that I had seen, quite a number of them, did not stay at any particular job or location for a long period of time. So this one kind of stood out . . . . So I did not consider him for employment immediately on that day, enough though I had committed three people that day that didn't show up. But later on, I got to looking at him, and I got to thinking and I remembered talking to him, and he made an impression on me as someone that I thought would be a very good candidate. And so on March 11, I contacted him and left a message and got a hold of him and made him an offer of employment . . . .

The Charging Party pointed out that alleged discriminatees Terrio and Daniel Overmier also indicated electrical engineering studies. Widemire did not interview either Terrio or Overmier, but made clear that it was not Jones electrical engineering educational background that caused Widemire to interview him. It was merely "in the process of talking to him and re-

viewing his application and interviewing him, that was one thing that I remembered as standing out." In addition to remembering Jones and believing that he would be a good candidate, Widemire went a step further with respect to Jones' application, and spoke with Gerri Willis at Becon Construction. Widemire did not make an immediate offer to Jones because he was uncertain, from Jones' application, whether he was actually a journeyman. Jones' application showed that he moved from a pay rate of $9.50 in December 1994 to $11.50 in December 1995 and $15.50 in February 1998. Those were significant increases in pay and this became "one of the very rare occasions where I called another company" and verified the applicant's information. The reference he received from Willis was "a very, very good recommendation." As a consequence, on March 11 Widemire left word at Jones' home and, when Jones returned the call, Widemire made him an offer of employment.

Thus, in March 1998, only six electricians were hired. Four of the six were former Brown & Root employees. A fifth was referred by the electrical superintendent. The only person hired who did not fit the preferred categories described in Respondent's field hiring procedure was Jones, a minority, who happened to particularly impress Widemire.

It is true that at this time there were four "union applicants" who were former Brown & Root employees: James, Lavergne, Loupe, and Aycock. I agree with Respondent, however, that in each instance, their applications inadequately described their duties and/or described duties which did not equal the recent, relevant experience of the the people Widemire selected, all of whom except Jones were also entitled to preferential consideration.

The next electrician was not hired until April 27.

Not counting former Brown & Root employees, 23 alleged discriminatees applied with Respondent in January 1998. After reviewing their applications, Widemire concluded that all but three of those were not people he would seriously consider hiring, either because of what was on their applications (e.g., residential, commercial, or nuclear power experience) or because of what was not on their applications (i.e., little or no description of the actual duties they had performed). Those who were in effect rejected are Berthelot, Barnette, Beauchamp, Hargrove, Bailey, Browning, Gibson, Guarino, Picard, Sheehan, Terrio, Wade, Brown, Lovett, Daniel Overmier, Timothy Overmier, Patrick Overmier, Stevens, and finally Zylks. Three of the January applicants (Gauthreaux, Leslie Carter, and Chevalier) were people who Widemire would seriously consider at some point in the future because of what their applications showed.

During February and early March, five more alleged discriminatees applied with Respondent. Two of them, Lavergne and James, were former Brown & Root employees. The other three, Barry Curtis, Randall Curtis, and James Carroll Carter were all people Widemire concluded he would not seriously consider hiring because of what was, or was not, on their applications.

By the end of February, the applications of Barnette, Leslie Carter, Hargrove, Wade, Lovett, Patrick Overmier, and Stevens were no longer active according to Brown & Root's field hiring procedures. None of those individuals were current or former Brown & Root employees. Even under the loosest procedure sometimes followed, by the end of March, all seven of those applications would have been removed to the inactive applicant file and given no further consideration.

By the end of April, even under the loosest procedure sometimes followed, the applications of Berthelot, Gauthreaux, Beauchamp, Gibson, Picard, Terrio, Timothy Overmier, Randall Curtis, Barry Curtis, and James Carrol Carter were also removed to the inactive applicant file and given no further consideration. Thus, of the three people who Widemire would have seriously considered hiring besides former Brown & Root "Union" applicants, only 1—Chevalier—still had an active application after April 30.

From March 25 until the next electrician was hired on April 27, there were almost 100 requisitions for labor from the Shell jobsite. Almost 800 applications were received, and more than 200 people were hired. The volume of work for both Widemire and Marshall and the two office clericals had, if anything, accelerated from the January through mid-March time period. In addition, during that same March 18 through April 27 period, another 100 persons were given conditional offers of employment, but for a variety of reasons, failed to satisfactorily complete their preemployment processing. It is not surprising that Widemire would be unable to interview many applicants, particularly when there were scores of applications received on any particular day. For example, on March 18, 43 applications were received; on March 19, 28 applications were received; on March 23, 59 applications were received; on March 30, 56 applications were received; on April 2, 33 applications were received; and on April 6, 53 applications were received. Throughout this March 18 to April 27 period, the pressure to hire carpenters, rod busters, insulators, structural iron welders, concrete finishers, laborers, and helpers intensified.

From April 27 to May 11, Respondent hired four electricians—all were former Brown & Root employees. Burch was hired April 27 for the position of expeditor/engineer's aide, for which he was recommended by his father, an electrical general foreman and superintendent. Justus and Houston, hired May 4, both had recent experience with Brown & Root, and Houston came recommended by the jobsite superintendent. Williams, hired May 5, was personally known to Widemire, who had hired him to work for Respondent in Brunswick, Georgia.

As noted above, counsel for the General Counsel argues in his posttrial brief that while the preference given to former Brown & Root employees is not unlawful, in this case Respondent hired some of those people despite poor work records in order to avoid hiring alleged discriminatees. As counsel for the General Counsel also notes, Respondent's field hiring procedures states: "Preferential Employment Consideration will be given to current or former Brown & Root employees *with a good work history and safety record*." (Emphasis added.) The case of Wallace Justus is particularly instructive about the day-to-day application of that procedure, and in particular the implementation of the requirement that the individual have a "good work history." Long before "union applicants" appeared at either Port Hudson or Gonzales in January 1998, Justus, whose original hire date is January 5, 1976, was hired, laid off, and sometimes even terminated, and yet rehired again despite

"F" (fair) and "P" (poor) ratings. For example, Justus was terminated for unsatisfactory performance in November 1993 with a "P" rating, only to be rehired less than 3 months later and to remain on that job for approximately 2 months before being laid off with a "G" (good) rating. Justus was then rehired on June 7, 1994, and was laid off from that job 3 months later with an "F" rating.

Justus was rehired approximately 8 months later, worked for almost 2 months, and was again terminated for unsatisfactory performance. Less than 2 weeks later, however, Justus was rehired at another Brown & Root project, and worked on that project for 3 weeks before separating for personal reasons and receiving another "F" rating. Justus was employed again by Brown & Root 2 weeks later at a different project, and worked on that project for a month before he was laid off with a "G" rating. Since that "G" rating in September 1995, Justus has received several "G" ratings, another "F" rating and a "P" rating.

It is abundantly clear that well before any union activity, Brown & Root implemented the need for a "good" rating very loosely, if at all. Without regard to any ongoing union activity, Respondent frequently gave employees multiple opportunities to return to work and redeem their previous performance. As Respondent argues, the value of doing this is apparent in that skilled individuals are retained in the work force. Further, as is obvious from the case of Justus, people working in an itinerant labor force often perform differently on different jobs, depending on both the job itself and their personal circumstances at the time. Finally, some people simply improve when given additional opportunities under different circumstances, as is apparent from the successive "G" ratings from September 1996 through February 1998 and thereafter for Justus. The evidence simply does not support counsel for the General Counsel's argument that in this case, Respondent deviated from past practice and hired some people despite poor work records in order to avoid hiring alleged discriminatees. Rather, the evidence supports Respondent's argument that its hiring practice in this case was consistent with its practice before—and without regard to—any union activity.

In mid-May 1998, Chruma was assigned by Hopper to be the human resources supervisor for the Gonzales employment office. Work opportunities for Brown & Root were continuing to grow in the Geismar/Gonzales office, and Chruma had significant experience managing multiple projects. The BASF project was ready to start. Respondent knew it had an opportunity on the Vulcan project, along with a year remaining on the Shell Chemical project. Chruma had 12 years experience in the human resources field with Brown & Root and considerable human resources experience in Louisiana. Widemire was retained with no loss of pay or job title change, but Widemire now reported to Chruma.

Not long after Chruma arrived, the job requisitions for electricians began to increase, and the record shows that by late May to early June, Widemire and Chruma were discussing the diminishing supply of recently laid-off former Brown & Root electricians. On May 19, the personnel office received a job requisition for three journeyman electricians and six electrical helpers, with a "Required Date" of May 26. This requisition contained no "by-name requisitions." On May 26, 1 week later, the personnel office received another requisition for labor with a "Required Date" of June 1 for another three electricians and five helpers. On June 18, yet another requisition arrived requesting three more electricians and two helpers. And, on July 1 there was a request for an additional two electricians and four helpers. In filling these requisitions, all alleged discriminatees who were former Brown & Root employees were offered jobs. None accepted.

Up to this point, mid- to late June, Widemire and the employment office had been successful in employing former Brown & Root employees, including electricians with recent, relevant experience and individuals who had been referred by the Shell Chemical project supervision. However, Chruma and Widemire both testified credibly they knew that requisitions for electricians would continue to arrive on a steady basis for some time. With the expected need for additional electricians—and the number of Brown & Root electricians with recent, relevant experience or jobsite recommendations declining—Widemire and Chruma discussed some of the applications that had prior Brown & Root experience, but whose recent, relevant experience was "not quite what we had been looking for, up to that time." In the short space of a few weeks, as a function of supply and demand, other former Brown & Root employees with considerably less, if any, recent or relevant experience, including the former Brown & Root "union" applicants, would be offered employment.

Chruma decided to personally handle contacting the "union applicants" to make them offers of employment, to insure and verify that "it was done and done properly." Applications reflect, by notations made by Chruma on the reverse side, and verified by both telephone logs and by letters from Chruma to particular applicants, that Respondent made attempts to offer employment to Aycock, Lavergne, Loupe, James, and Wallace Goetzman on several occasions. Goetzman was the last alleged discriminatee to apply with Respondent. Goetzman, who applied on June 2, was a former Brown & Root employee entitled to preferential consideration under Respondent's hiring policy.

Counsel for the General Counsel argues that the job offers to Aycock, Lavergne, Loupe, James, and Goetzman were a hollow gesture, done only because of the pending unfair labor practice charges. It must be noted, however, that these job offers were in fact made before the Charging Party filed its charge alleging refusal to consider or refusal to hire those individuals through the Gonzales personnel office. None of the individuals contacted returned Chruma's phone calls. Chruma eventually spoke with Goetzman, however, who stated that he was unavailable for work due to an injured leg.

Backgrounds of the people hired in response to the flood of requisitions for electrician during May and June shows that in spite of alleged discriminatees failing to respond to job offers, Respondent did not deviate significantly from its pattern of preferring former Brown & Root employees. Almost all of the people hired to fill those positions met that preference. Mitchell, hired May 19, was a former Brown & Root employee who Widehmire had tried unsuccessfully to hire on several occasions during January and February. Flanagan, hired May 26, was a former Brown & Root employee whose name was

called in from the jobsite. Walters and Juarez, both former Brown & Root employees, were scheduled to be hired on May 26 and 29, respectively, but did not show. Juarez was subsequently hired. Carter, hired June 1, and Boyd, hired June 2, were both Brown & Root employees who transferred directly from another project.

Gilbert, Elisar, and Hearst, hired on June 9 and 10, were all "by-name requisitions." Frazier, hired June 15, was a former Brown & Root employee. Radtke, hired on June 18, as well as Barck and LeBlanc, both hired on June 22, were former Brown & Root employees as well as "by-name requisitions." Muse, hired on June 23, was also a former Brown & Root employee. Burns was rehired on the Shell Chemical project on June 23, after leaving for 2 months to work for someone else and later calling Widemire to say he did not like it and wanted to come back to work for Respondent.

Scott Hudnall completed an application on August 4, 1998, and was interviewed by Marshall. Marshall noted on the reverse of Hudnall's application, under interviewer's comments: "8–4–99—has all tools, no trouble climbing, ABC school two-year degree. Referred by an employee, also worked for MMR Radon for about three years. Did some residential, commercial work." Widemire and Marshall made a decision on August 4, when Hudnall applied, to offer him a position, and instructed him to return the following day for processing. Hudnall's most recent experience, as reflected on his application, was from January to August 1998 in the commercial business running a service truck. This was not relevant experience, and not considered as such by Respondent, but, as Respondent notes, Widemire and Marshall did not have many former Brown & Root applications available with or without recent, relevant experience. By this time, however, none of the non-Brown & Root union affiliated applications were active, except for Zylks', whose case is discussed separately below.

The Charging Party compared Hudnall's application which indicated he had "run a service truck" with Loupe who also indicated running a "service truck." There is no difference between the two activities, at least insofar as the applications on their face indicate, but Hudnall was employed following Marshall's conversation with him in which Marshall determined that Hudnall had worked for MMR Radon for about 3 years, that he had ABC craft training and had worked for Davis International doing the same type of industrial work which Brown & Root does. Loupe, on the other hand, showed no industrial work except at Stone & Webster working at a nuclear power plant. Moreover, as the record shows, by August 1998, Loupe and the other former Brown & Root "union applicants" had failed to respond to multiple efforts made by Respondent to contact them.

During September, Respondent hired 10 electricians, with one of them actually being assigned as a materials expediter, Chauvin. Of the remaining nine, five were former Brown & Root employees and three were direct jobsite referrals. Metcalfe, the ninth, was a "walk-in" who had considerable recent, relevant experience.

During September and October 1998, Widemire was under considerable pressure to fill five different job requisitions calling for a total of 16 electricians, only 1 of whom was a "by-name requisition," plus 6 helpers. Further, in the usual conversations that Widemire had with Daniels, Widemire knew that during October Daniels would be requesting another dozen or more journeymen electricians. At this time, early October 1998, Chruma again called for Aycock, Loupe, James, Lavergne, and Goetzman in an effort to hire those individuals to fill the many positions that Daniels was requisitioning.

In October, 15 electricians were hired. Of those, eight were former Brown & Root employees and three were direct job referrals. As noted before, however, by this time in October no alleged discriminatee except Zylks had an active application on file. The most recent, inactive application was approximately 5 months old. The former Brown & Root alleged discriminatees had, on multiple occasions, rejected attempts to give them offers of employment. In spite of that, during October, admittedly aware that an unfair labor charge had been filed, Respondent went to the unusual extent of writing each of those alleged discriminatees, informing them of the efforts to contact them and reinviting them to renew their interest, if any, in employment with Brown & Root. None responded.

Thus, the record shows that in June, July, and throughout October, alleged discriminatees with former Brown & Root experience were not only considered, but Respondent made multiple efforts to offer them employment. Exhibits detail Brown & Root's continuing efforts to contact Aycock, Lavergne, Loupe, James, and Goetzman in order to offer them employment at either the Shell Chemical or BASF projects. Chruma testified as to his actions with regard to those individuals after mailing the October 14 letter offering them employment:

> At that point, I felt that we had tried several times. They had ample opportunities. None of them were courteous enough to even call me back so they showed no interest, obviously were working, and at that point, I decided that that's—we don't need to contact them again. Let's wait until they contact us.

By October, the only alleged discriminatees whose applications were still active pursuant to the field hiring procedures were the former Brown & Root "union applicants" and Zylks. By the time Hebert was hired for to fill a requisition which was received in the employment office on October 26, 1998, even the Brown & Root "union applicants" were no longer being actively considered, since they had, by not responding to Chruma's telephone calls and letters, effectively indicated they were not interested in employment. Thus, the only "union applicant" whose application was both active and regularly reviewed was applicant Zylks. Widemire and Chruma both testified as to why Zylks was not offered employment.

I. Zylks

Zylks' application has, with rare if any exceptions, remained active from the day he first applied on January 20, 1998. There was no change in the substance of that application when it was reactivated on February 16, nor in his March 2 application when it was updated four times. Widemire explained why Zylks' applications were not favorably considered:

> When Mr. Zylks—when his original application came in on January 20, 1998, I looked at it at that time, and I

made a decision at that time that, due to the most recent experience that he had from June 5, 1995 to the present, that he had been working full-time for the IBEW 995.

. . . .

I made a decision that Mr. Zylks did not have any recent, relevant experience, and I was not interested in hiring him at that time.

Mr. Zylks came back in in February and updated the same application, without making any change, so my decision stayed the same, that I did not see any recent, relevant experience and was not interested at that time.

Mr. Zylks came back in in March and put in a new application, and the information remained the same, so my decision remained the same at that time. . . .

On the back of the March 2 application, he reactivates it on April 1, April 30, June 1, and July 1. In each of those times he had come in to reactivate his application, we normally would ask—and I remember on a couple of occasions asking Mr. Zylks—if anything had changed or if there was anything he wanted to add to his application or if he had any other work, and he always indicated in the negative, so my decision at that time remained the same, up through July.

As Widemire notes, up to this point there was absolutely no indication that during the previous 3 years, Zylks had performed any of the work normally performed on a daily basis by electricians. Widemire put it more simply—there was nothing to show Zylks had not done any work "on his tools" since June 5, 1995. Zylks completed a new application on August 18, which did provide new and different information from his previous applications. Widemire was asked whether he actually had occasion to review this new application. Widemire responded credibly that he did. This August 1998 application, while containing the same information in the previous employment section from June 5, 1995, to present as a union organizer, did include for the first time employment from April 9 to May 9, 1997, for ISC at Texaco. Unfortunately, for this contractor, Zylks did not explain what his job title and duties were beyond stating: "Electrician." In addition, Zylks added another employer's name, Westgate, as having employed him from January 6 to February 6, 1996, at ISC Nitrogen. Again, the job title and duties described were: "Electrician." In neither instance did Zylks explain the type of work that he had been doing for ISC or Westgate. Widemire testified:

> In August, Mr. Zylks comes in and puts a new application in on August 18, ... He indicates in the referred-by column that he is updating it for the eighth time, and he still lists as his first employment that from June 5 of 1995 to the present time, that he is working full-time for the IBEW.
>
> On this application, there is a change, in that on the previous applications, there was mention of some work back in '94 and '95 and on this application, he puts down that from April 9 of 1997 to May 9 of 1997 . . . that he worked for ISC. So for about a month, he worked there as an electrician . . . at the Texaco plant. And then below that he puts in that in '96 he worked for approximately a month at the PCS Nitrogen plant for Westgate Electrical.
>
> This application was different than the other application. At that time, in August I took a look at it, and I notice that all of a sudden, after . . . seven months of seeing the same applications steadily, that Mr. Zylks had gone back and found where he had worked for a month in '96 and a month in '97 for these companies, and added that to it.
>
> That—those two one month jobs did not change my decision at that time. I was suspicious as to why the application had been changed, but I did not ask Mr. Zylks why he had changed his application . . . .

It was considered unusual by both Chruma and Widemire that, despite having completed applications in January and March and updating those two applications a total of five times, Zylks had never described work other than work as a union organizer. When, on August 18, 1998, Zylks added work for approximately a month in 1996 and another month in 1997, it caused Widemire and Chruma to question the validity of Zylks' applications. Zylks updated his August 1998 application once, on September 17, without change.

On October 16, Zylks completed a new application that noted in the section for previous employment "same as other applications," but added that he had worked from September 21 to October 7, 1998, for H. B. Zachary at Port Allen, Louisiana. Zylks again, however, listed his job title and duties merely as: "electrician" without explaining anything further about his duties at that place. Zylks did not offer any explanation as to the specific type of work that he had performed with contractors since becoming a full-time union organizer in June 1995. Neither Widemire nor Chruma were convinced by these later applications that Zylks had recent, relevant experience. Zylks, of course, was not entitled to any preferential consideration under the field hiring procedure.

Widemire was asked if he had occasion during the October and November 1998 period to review Zylks applications and make a decision as to whether or not he would offer Zylks employment. Widemire responded :

> Mr. Zylks' applications have been in this file for—at this time, for many months and in looking through the whole file, I would have seen Mr. Zylks' application. I do not have a specific recollection of pulling it out and looking over it again at this time. [October - November 1998] I had looked at it previously on almost a regular monthly basis.
>
> . . . .
>
> October 16, 1998, Mr. Zylks comes back in, fills out a new application, and then on this one, he states that . . . under the referred by column, there is a—in my handwriting, there is a Buddy Partin, and above that is 1/15 of 99 which is also in my handwriting. . . .
>
> This application was reactivated on November 16, on December 16, and then on January 15 of '99, which is also in my . . . . handwriting. That's when I made the note that he said he was referred by Mr. Buddy Partin. On 1/15/99, I made that note there.

> But in looking at the application on October 16, he indicates on the first line, that he had gone to work for H. P. Zachry on September 21, 1998 on the Port Allen job as an electrician, and that he worked until October 7, 1998 which is a little over two weeks' time.
>
> For all of this time, up until this application came in, I still did not consider Mr. Zylks to have enough recent, relevant experience for me to consider him at this time, and this two weeks of work that he did there did not change my mind, at this time or subsequently when he came back in, in November or December or January.

Widemire was not convinced that Zylks had recent, relevant experience and, as Zylks' applications even in August and October 1998 indicate, his job duties were those of a "electrician." There was no indication that Zylks had run conduit, installed cable trays, pulled wire or the other activities that would have been relevant to the Shell Chemical project.

J. BASF Project

While Shell was being manned, Brown & Root's Gonzales office assumed staffing responsibilities for the BASF project in April 1998, and the Vulcan Project in early 1999. The number of persons hired and offered employment on those two projects through May 15, 1999, added an additional 3300. This added an average of another 260 per month beginning in May 1998.

The BASF project "went to the field" and hiring began in April 1998, and continued through May 15, 1999. Parallel hiring activities for the BASF job were being conducted at the same time Shell Chemical project hiring continued. Scott Marshall was the person primarily responsible for hiring on the BASF job. Widemire was in charge of the office in April 1998, though Chruma would be assigned there in mid-May. Clericals Allgood and Jordan were assisting Marshall and Widemire with the clerical work. Like the Shell startup in 1997 and early 1998, BASF hiring in April 1998 concentrated upon supervision, clericals, carpenters, concrete finishers, rodbusters, and helpers in those classifications, as well as laborers.

Tools utilized by Marshall in making any of his hiring decisions included job summaries, applications, terminated employee reports either from the employment office's computer or from other jobsites, reduction of force lists, and of course job requisitions.

The first requisition for labor from BASF requesting that the employment office hire an electrician and/or an electrician's helper was dated May 26, 1998. The requisition came into the employment office with three names written in for all three requested positions: Otis (Randy) McHenry, a foreman; Edward Iglinsky, a helper; and, David Fredenburg, an electrician. The notation was also made that "David Fredenburg will report to personnel office on June 8, 1998." This requisition required nothing from Marshall other than to process the identified individuals when they appeared at the employment office. Fredenburg, hired June 8, was the first electrician hired on the BASF project.

The BASF job was well underway by the time McHenry, the electrical foreman, and Iglinsky, the electrical helper, were employed. McHenry and Iglinsky were hired on June 1, and from date of the first BASF hire, April 27, through the end of May, the BASF project had hired 106 people. In addition, 27 other people, none in the electrical department, had been made offers of employment, and for one reason or another had not satisfactorily completed their preemployment processing requirements.

Only a few applications of alleged discriminatees were still active by May 26 when the first requisition for an electrician at BASF arrived. There were, of course, those of former Brown & Root employees Aycock, Loupe, James, Lavergne, and Goetzman.[4] Applications of those who had continued to update their applications were also still active, namely Zylks, Barnette (last update May 1), Don Guarino (last update May 5), and Richard Bailey (last update May 1).

Summaries of people hired for the BASF project show that "by name requisitions" vastly outnumbered all others. In short, the record shows that from June through September 1998, every electrician hired at BASF was a former Brown & Root employee with recent, relevant experience. The vast majority of them were "by-name requisitions."

During October 1998, most, but not all hires were former Brown & Root employees, and many were "by-name requisitions." Respondent admits that in some cases, people were hired with less than ideal recent, relevant work experience. At this time, the Gonzales employment office had already gone through the files of former Brown & Root applicants. While the BASF job had been staffed to this point with by-name requisitions, Widemire (on the Shell Chemical project) and Marshall (on the BASF project) were now exhausting the Brown & Root files, and were recruiting from active non-Brown & Root files, and those candidates who walked in to complete applications. From November 1998 through May 1999, however, all of the electricians hired, with perhaps only one or two exceptions, were former Brown & Root employees and/or "by-name requisitions." By October 1998 there were no alleged discriminatees under "active" consideration who compared more favorably than those hired.

The unchallenged and credible testimony of clericals Allgood and Jordan, recruiters Marshall and Widemire, and Personnel Manager Chruma was that at the Gonzales employment office, applications were coded and filed according to the craft which the applicant placed in the position applied for first choice section. Each of the alleged discriminatees applied for an electrician's position and noted that in the first choice section. A handful of applicants noted, in addition to electrician in the first choice section such things as "INS" (Zylks' January 20, 1998 application); "E&I" (Zylks' March 2, 1998 application); and "elect. & inst. tech." (Randall Curtis' February 25, 1998 application). Each of the alleged discriminatee's applications was filed in the journeyman electrician folder, either Brown & Root or non-Brown & Root, as appropriate. No alleged discriminatees' applications were ever in the instrument fitter folder. No instrument fitters were hired on the Shell Chemical project. Instrument fitters were employed at BASF only.

[4] Chruma's explanation, though, of his efforts to hire Aycock, Loupe, James, Lavergne, and Goetzman is equally applicable to the BASF project as to the Shell Chemical project.

The record shows that instrument fitters at BASF were hired primarily from "by name requisitions" and Brown & Root instrument fitters laid off from other jobs. Some were hired as a result of being referred by supervisors or employees on the BASF job. The record shows, and Respondent candidly admits, that none of the alleged discriminatees were ever considered for instrument fitter positions because the applications were all coded and filed with first choice being "Electrician."

K. Vulcan Project

The Vulcan Project "went to the field" and hiring began during the last few weeks of 1998. By December 31, 1998, only five individuals had been staffed on the Vulcan Project. Hiring for the Vulcan Project was still going on while this trial was in progress. At all relevant times, the Vulcan Project was staffed primarily through the Gonzales employment office, where Scott Marshall, to a great extent, and Patricia Simmons, to a lesser extent, did the vast majority, if not all, of the hiring.

From the beginning of the project through May 15, 1999, approximately 37 people were "signed up by the timekeepers" at the project, and all were "direct hires." Those employees are reflected in the Vulcan "Direct Hire" Log, and are primarily supervisory personnel. Marshall testified that those direct hires were "all just transfers, either out of Houston or from another Brown & Root job." The direct-hire requisitions for labor were completed at the project, were "internal requisitions for the personnel that they signed up on the job site," and would never have been sent to the Gonzales employment office, nor seen by anyone in the employment office. As a result, no hiring decisions were made by the Gonzales employment office for any of the hires at the Vulcan Project which are listed on the Vulcan "Direct Hire" log.

No one was hired in the electrical department at Vulcan until April 1999. By April, when these electrical hires were made at Vulcan, none of the alleged discriminatees had active applications, except, of course, those of the former Brown & Root employees and Zylks. However, all three of the electrical hires at the Vulcan Project were either "direct hires" by the project or "by-name requisitions." At least until May 1999 when this trial began, there was no hiring activity at Vulcan for electrical workers whatsoever by the Gonzales employment office.

Analysis and Conclusions

In its very recent decision in *FES (A Division of Thermo Power)*, 331 NLRB No. 20 (2000), the Board examined many of its past refusal-to-hire cases and defined a specific framework for analyzing future cases. In relevant part, the Board stated:

> To establish a discriminatory refusal to hire, the General Counsel must . . . first show the following at the hearing on the merits: (1) that the respondent was hiring . . .; (2) that the applicants had experience or training relevant to the announced or generally known requirements of the positions for hire . . .; and (3) that antiunion animus contributed to the decision not to hire the applicants. (Relevant footnote discussed below.) Once this is established, the burden will shift to the respondent to show that it would not have hired the applicants even in the absence of their union activity or affiliation. If the respondent asserts that the applicants were not qualified for the positions it was filling, it is the respondent's burden to show, at the hearing on the merits, that they did not possess the specific qualifications the position required or that others (who were hired) had superior qualifications, and that it would not have hired them for that reason even in the absence of their union support or activity.

The Board further defines the General Counsel's burden of proof as it relates to showing that applicants are qualified. The Board states the General Counsel's burden is "limited to showing" applicants meet "facial requirements . . . based on nondiscriminatory, objective, and quantifiable employment criteria." These criteria the Board refers to repeatedly in its decision as "objective criteria."

Specific qualifications the position might require, or the employer might prefer, are defined in the Board's decision as "subjective criteria," regardless of how job related they might be. Thus, the Board uses the example that so long as the General Counsel shows "journeymen electricians" are applying for "journeyman" positions, the General Counsel has met its burden of proof.

The Board explains its rationale for assigning "objective criteria" to the General Counsel and "subjective criteria" to the employer:

> [I]t apropriately falls to the General Counsel to show that the applicants met the objective employment criteria of the position at issue. (Footnote omitted.) On the other hand, the employer alone knows the full range of its subjective and/or judgemental employment criteria. Further, the employer is in possession of the information about the qualifications of the applicants it has hired. It is, therefore, appropriate that the burden fall to the employer to establish that the applicant did not meet its spefific criteria for the position, was otherwise unqualified for the position, or was not as qualified as those who were hired.

By requiring the General Counsel to show only that applicants meet "facial" qualifications, the Board shifts most of the burden of proof in refusal-to-hire cases from the General Counsel to the respondent. As a judge, I feel a need to be vigilant of the fact that the Board catagorizes the General Counsel's burden of proof, limited as it is, as "objective," while catagorizing other necessary or preferred job-related skills as "subjective." Certain job requirements and skills are being labeled "objective" and others "subjective" simply by definition, and not because of their actual job relatedness or their legitimate interest to an employer. As the judge, I must continue to look beyond the fact that certain people who might have been hired were not, to determine whether there is evidence of disparate treatment (discrimination) caused by unlawful motivation (animus).

In addressing the issue of animus, footnote 8 of the Board's decision is particularly worthy of note. In that footnote, the Board states:

> We do not address the nature of proof necessary to show antiunion motivation, because that was not an issue in this case. Rather, we adhere to existing law on that issue. Our concurring colleague, Member Brame, insists upon "direct evidence"

> of discriminatory motivation. In most cases where 8(a)(3) violations are found, the conclusion is inferred from all of the circumstances. We know of no case which eschews this approach, and we would not abandon it.

Counsel for the General recognizes there is very little evidence of union animus in this case, and there is no allegation of any independent violation of Section 8(a)(1) of the Act. After considering all the evidence, I conclude that the two incidents that are relied on to establish animus fail. I find the taped conversation between Union Business Agent Zylks and Instrument Foreman Swanson contains remarks that are, at best, ambiguous. Moreover, Swanson did not play any role in the decision not to hire the alleged discriminatees.

Widemire taking down the union leaflet from Respondent's bulletin board represents uniform enforcement of a rule which counsel for the General Counsel does not even argue to be unlawful. Zylks' trial version of the other items posted, specifically the vehicle for sale, was proven incorrect, and there was convincing evidence that Respondent uniformly enforced the rule prohibiting anything from being posted on its bulletin board which was not directly business related.

Finally, I find that the change in rule enforcement for updating applications by telephone in no way establishes union animus by Respondent. Credible evidence shows that the change, requiring compliance with Respondent's official stated policy, occurred solely because the more lax practice became burdensome on the clerical staff as hiring at the Gonzales employment office accelerated. The change was logically explained, and the new rule was completely benign concerning any applicant, union-affiliated or otherwise, who wished to update their applications. There was no evidence submitted by counsel for the General Counsel or the Charging Party that enforcement of the correct policy prevented alleged discriminatees from reactivating their applications.

In the absence of other independent violations of Section 8(a)(1) of the Act, none of these incidents rise to the level of demonstrating union animus on Respondent's part. Thus, if animus is to be found, it must be "inferred from all the circumstances," as the Board says in footnote 8 of its *Thermo Power* decision. In the case at hand, if animus is to found it must be inferred solely from the fact that Respondent did not hire any of the alleged discriminatees. After considering and analyzing all the evidence before me, however, I conclude no animus should be inferred from the mere fact that none of the alleged discriminatees were hired by Respondent. The actual hirings are entirely explained without reference to any unlawful motivation.

Regarding the Port Hudson/Georgia Pacific project, the uncontraverted evidence is that all of the applications of alleged discriminatees were filed as electricians—and therefore, under the facts here, would have been considered only by Partin if they had been considered at all. Partin followed the only practice he knew in hiring personnel. Partin's record of hiring shows that all eight of the people he hired were either current or former Brown & Root employees or were recommended by current Brown & Root supervision or employees. This pattern parallels exactly the preferences established under Respondent's field hiring procedure. Partin testified credibly that despite the fact there were some applications for electricians on file in Brooks' office, he never even bothered to look at any applications in making his hiring decisions. There was absolutely no evidence submitted to even suggest union animus on the part of Partin, and Partin did not even know that there were applicants who were union supporters.

The record shows that because of the way the applications were filed, none of the alleged discriminatees were known to, or passed over by, Instrument Fitter Foreman Swanson. Indeed, Swanson testified credibly that following the taped telephone conversation with Zylks, described in detail above, he looked for Zylks' application but did not find it. A review of the people Swanson did hire shows that he, like Partin, followed the common practice of hiring former Brown & Root employees and applicants personally recommended to him.

Partin's and Swanson's hiring practices both show that even without specific training regarding Respondent's formal field hiring procedures, the common practice was to give first preference (a "subjective criteria" by the Board's definition) to former Brown & Root employees, and, when they were not available, to then hire whenever possible someone who was recommended either by jobsite management or by another Brown & Root employee. In Swanson's case, three people he hired were current or former employees of Brown & Root, and five people were all recommended by supervision or current employees. While Respondent's formal field hiring procedure was not consciously in play, all but one of every hire made by either Partin or Swanson fell into the "preferred" categories described by this procedure. This evidence convinces me that eventhough it falls into the Board's definition of "subjective criteria," Respondent's practice of giving preference to certain types of applicants has been in place and applied for years, having nothing whatever to do with trying to exclude union applicants, and everything to do with trying to maintain a reliable core of quality employees upon whom Respondent could depend. I find, based on the facts described above, that neither Partin nor Swanson discriminated in any way based on union activity in making their hiring decisions.

Counsel for the General Counsel does not argue that the field hiring procedure, and preferences it accords, is per se unlawful. Pursuant to this policy, Respondent formally establishes preferential hiring consideration for current and former Brown & Root employees and those recommended either by supervisors or by other employees. The actual practice has developed for jobsite supervisors to submit "requisitions for labor" to the personnel/hiring office which often have names already filled in for some or all of the people to be hired for those openings. The people named, "by-name requisitions," are offered the position, whether or not they are a current or former Brown & Root employee. This too falls into the category of "subjective criteria" by the Board's definition. In this case, however, counsel for the General Counsel concedes that it was applied uniformly. For those positions that do not already name the person to be hired, preferential consideration called for by the field hiring procedure is given to former Brown & Root employees.

Applications expire after 30 days. If not renewed, they are purged from the files and become inactive. This rule, spelled

out in the field hiring procedure, applies only to "new hire applicants." The rule does not apply to former Brown & Root employees, whose applications remain active throughout the duration of any particular project for which they apply.

Almost 300 people applied for work at the Gonzales hiring office in the first 3 weeks of January 1998. Included among them were the bulk of the alleged discriminatees. During this same time, more than 60 labor requisitions came from the field. Few electricians were among these. The Gonzales employment office hired only 29 electricians for the Shell project between January and June 23, 1998. Five of those 29 were all hired or had commitments made to them prior to the receipt of "union applications.' Thus, only 25 electricians were hired from the onset of union "salting" activity at Gonzales until the date Chruma first made calls to the former Brown & Root "union" applicants to offer them work.

Widemire testified credibly that as applications arrived, he evaluated every application before it was filed, although often near the end of the workday and sometimes briefly. Widemire explained that in evaluating applications for electricians, he was looking for a certain specific type of experience, i.e., experience in heavy industrial electrical installation. He was not looking for, and in fact discounted applicants who had residential, commercial, or nuclear power plant experience because the work was not similar to the kind of duties being performed at Shell.

It is here that one must be very careful in catagorizing Respondent's preference for heavy industrial electrical installation experience as "subjective." The record shows that just as there are distinctions between lawyers practicing different specialities, there are similar distinctions between electricians. Residential and commercial electrical installation deals primarily with voltages in the 110–220 range and relatively simple wiring patterns. Heavy industrial electrical installation regularly involves installing complicated wiring patterns and devices that use voltage measured in thousands of volts. Further, as the testimony of Widemire and others shows, Respondent was looking for employees with actual experience doing the same type of work it was doing. This represents a legitimate business interest that minimizes training and supervision and maximizes efficiency.

At times I questioned the reason for Widemire's failure to interview "union applicants." Now that I have had a chance to consider the entire record, however, I agree that they were treated no differently than hundreds and hundreds of other applicants who were not interviewed. The numbers of applications and hires permitted Widemire little time to interview crafts that he was under no pressure to hire. The record reflects that Widemire did not interview walk-in applicants at all unless there was a specific job opening which he was trying to fill. It is clear from the volume of applicants that interviews were the exception rather than the rule. At the time the first alleged discriminatees applied, there were no unfilled requisitions for electricians. The next requisition for an electrician did not come until February 4, and even then only one electrician was needed. Moreover, no electrician was hired from February 11 until March 11.

Following several months of permitting telephone updating of applications, in approximately mid-February 1998, this practice was stopped. From that point on, the Gonzales employment office has followed official corporate policy, which requires applicants to update their applications in person. The evidence shows that the practice of allowing applications to be updated by phone had become burdensome. The incorrect practice was ended and the practice called-for by the field hiring policy was followed. Timing is the only factor that even suggests that this change might have been motivated by union animus. In the final analysis, however, there is no reason to believe that Respondent's reason for the change was anything other than as it was presented, or that it could reasonably be viewed as preventing any of the alleged discriminatees from filing or reactivating applications.

There were only six electricians hired in March 1998, one in April 1998, and five in May 1998. These electricians were a minuscule part of the overall hiring of other crafts and helpers in those 3 months. Of the 25 electricians hired between the time alleged discriminatees applied in January and June 23, all except 3 of those were former Brown & Root employees entitled to preferential consideration. Of those three, Brady accompanied Cook, who had already been made a commitment, and filled a requisition for labor need that Widemire had at that very moment. Achord was a jobsite referral both by a current employee and the electrical superintendent. Jones was the only person hired during this period from January through June 23, 1998, who did not fall into the preferred categories described in Respondent's field hiring procedures. Widemire happened to be particularly impressed with Jones, an African-American, who offered an impressive resume. After considering Jones' application for a number of weeks, and going to the unusual extent of calling Jones's most recent employer to determine his suitability for the position of electrician, Widemire made the decision to hire him.

From the actual hirings that occurred and Widemire's credible testimony, it is clear that from mid-March through June 23, there was no reason to go to the non-Brown & Root electrical application folder to find prospective employees. Jones was the last non-Brown & Root employee hired, and that occurred on March 18. From March 18 through June 23, no non-Brown & Root electrician was hired.

By the end of February, the applications of Barnette, Carter, Hargrove, Wade, Lovett, Patrick Overmier, and Stevens were no longer active according to Brown & Root's field hiring procedures. None of those individuals were current or former Brown & Root employees. Even under the loosest procedure sometimes followed, by the end of March those applications would have been removed to the inactive applicant file and given no further consideration.

By the end of April, even under the loosest procedure sometimes followed, the applications of Berthelot, Gauthreaux, Beauchamp, Gibson, Picard, Terrio, Timothy Overmier, Randall Curtis, Barry Curtis, and James Carroll Carter were also removed to the inactive applicant file and given no further consideration. By May 1 the only applications of alleged discriminatees which were active were: Browning, updated on April 3; Barnette and Bailey, both updated on May 1; Guarino updated

on May 5; Zylks, updated virtually every month; and of course the former Brown & Root applicants. Thus, of the three people who Widemire would have seriously considered hiring besides former Brown & Root "Union" applicants, only one—Chevalier—still had an active application after April 30.

By June 23, or at least by the end of June 1998, all of the alleged discriminatees' applications were inactive and not being considered, except for Zylks and the former Brown & Root employees.

The General Counsel's case, as it ultimately developed, is a very limited theory of alleged disparate treatment under a lawful policy. Counsel for the General Counsel concedes that preference accorded "by-name requisitions" was consistent and uniform. Counsel for the General Counsel concedes there is no issue of unlawful discrimination related to the hiring of "by-name requisitions." Rather, counsel for the General Counsel simply argues that while the preference given to former Brown & Root employees is not unlawful, in this case Respondent hired some of those people despite poor work records in order to avoid hiring alleged discriminatees. In support of this argument, counsel for the General Counsel points to the fact that Respondent's field hiring procedures states preference will be given to former Brown & Root employees "with a good work history." The case of Wallace Justus is particularly instructive. Long before any of the alleged discriminatees applied for work, Justus was hired, laid off, and even terminated for poor work—and yet rehired again and again. It is abundantly clear that well before any union activity, Brown & Root implemented the need for a "good" rating very loosely, if at all. The evidence supports Respondent's argument that its hiring practice in this case was consistent with its practice before—and without regard to—any union activity.

From January through August 20, 1998, Widemire had had the luxury of filling the overwhelming number of job requisitions for electricians from former Brown & Root employees, a large number of whom were "by-name requisitions." In addition, it was not until June 1998 that the volume of job requisitions for electricians accelerated to a point where the number of qualified Brown & Root former employees with recent, relevant experience was at risk of being exhausted.

Even in June 1998, when the number of Brown & Root applicants for recent, relevant experience had sunk to such a low level that the Company resorted to offering employment or attempting to offer employment to Brown & Rooters without recent, relevant experience, only fourteen electricians were hired. Including those 14 electricians, who as it turned out were all former Brown & Root employees, a total of 166 people were hired during June.

Widemire testified credibly he analyzed the applications of each of the alleged discriminatees in the same manner in which he looked at the applications of others and made a decision with respect to the majority of the alleged discriminatees that they did not indicate recent, relevant experience on their applications. Applications of alleged discriminatees who were former Brown & Root employees, Aycock, Lavergne, Loupe, James, and Goetzman, were retained in the Brown & Root file and have remained active. Those applications were considered as job requisitions arrived at the employment office without by-name requisitions. In fact, those people were offered open positions on more than one occasion. At the same time, however, I must agree with Respondent that the applications of those former Brown & Root employees did not indicate recent, relevant experience such that they were superior to other applications also entitled to preferential consideration. However, as Widemire, Chruma, and Hopper testified, the demands for electricians reached such levels that the supply of available former Brown & Root employees with recent, relevant experience was nearly exhausted. Chruma made repeated attempts to hire the five union-affiliated former Brown & Root employees. None of them responded affirmatively, and most did not respond at all.

Respondent made attempts to offer employment to Aycock, Lavergne, Loupe, James, and Goetzman on several occasions. Counsel for the General Counsel argues that this was a hollow gesture, done only because of the pending unfair labor practice charges. It must be noted, however, that these job offers were in fact made before the Charging Party filed its charge alleging refusal to consider or refusal to hire those individuals through the Gonzales personnel office. None of the individuals contacted returned Chruma's phone calls. Chruma eventually spoke with Goetzman, however, who stated that he was unavailable for work due to an injured leg.

In July 1998, only seven electricians were hired, yet all were former Brown & Root employees. There were 10 electricians hired in August. All but two were former Brown & Root employees. In the months of July and August, a total of 383 persons were hired, not including 157 to whom offers of employment were made.

In short, the level of activity in the employment office continued to remain at an intense pace, with electrical requisitions consuming only a small portion of the hiring activities of the office. None of the non-Brown & Root "union applicants" had active applications on file by August 1998 except for Zylks. The Brown & Root "union applicants," by August 1998, had failed to respond to multiple efforts at contacting them.

Ten additional electricians were hired in September, with one of them actually being assigned as a materials expediter, Chauvin. Of the remaining nine, five were former Brown & Root employees and three were direct jobsite referrals. Metcalfe, the ninth, was a "walk-in" who, though had considerable recent, relevant experience.

In October, 15 electricians were hired. Of those, eight were former Brown & Root employees and three were direct job referrals. As noted before, however, by this time in October no alleged discriminatee except Zylks had an active application on file. The most recent, inactive application was approximately 5 months old. The former Brown & Root alleged discriminatees had, on multiple occasions, rejected attempts to give them offers of employment. In spite of that, during October, admittedly aware that an unfair labor charge had been filed, Respondent went to the extent of writing each of the alleged discriminatees who are former Brown & Root employees, informing them of the efforts to contact them and reinviting them to renew their interest, if any, in employment. None responded.

During the trial, counsel for the General Counsel pointed to the fact that Respondent hired some electricians whose applica-

tions were more than 30 days old. From this counsel suggests that Respondent circumvented its field hiring procedure in order to avoid hiring alleged discriminatees. The record shows that seven electricians were hired more than 30 days after their date of application. Widemire testified credibly that two of them returned to the employment office and, as a result, their applications were retrieved from the inactive file. They were then offered positions and promptly processed in the routine manner. A third, Pottain, returned to the employment office as shown by his application, was interviewed, and was hired a week later. Two applications, those of Brignac and Thomas, were still in the active file after 30 days because the office was very busy in March 1999 and the staff was late in "purging" the files. The record shows that 936 applications were received in February 1999. 1013 applications were received in March 1999. 74 people were hired for the Shell project and another 424 people were hired for BASF during this 2-month period. This does not include people who were made offers of employment but who, for one reason or another, never went on the active payroll. Obviously the Gonzales employment office was extremely busy, and as it was credibly explained, during times like that purging of inactive applications from the files might occur early 1 month and late the next. Two more of the seven applied, but later became "by-name requisitions." When the job requisitions came in with their names, and they reported to the employment office, their applications were retrieved from the inactive file, and the normal processing activity was conducted. Thus, only two situations were actually beyond the 30 day "active" period set for the in the field hiring procedure. Those two—Brignac and Thomas—are situations which are readily explained and do not challenge the routine application of the field hiring procedure.

Respondent also hired 14 electricians at less than the usual full journeyman pay. Counsel for the General Counsel suggests this shows that Respondent was willing to hire some people - but not alleged discriminates—even though they were not ideal candidates. Eight people were hired as electricians but at less than the highest rate of pay. As Respondent argues, however, the record clearly shows that all of these people fit a common mold that simply does not apply to the alleged discriminatees. All of the electricians hired at less than top pay had recent experience in the petrochemical industry doing precisely the kind of work being done by Respondent, i.e., running conduit, pulling wire and installing cable trays, and had limited time working and being paid as a journeyman or just ready to "break" out as a journeyman. This common factor of very recent, relevant experience clearly set these individuals apart from the alleged discriminatees, none of whom, according to Widemire's credible analyses of their applications, had experience equal to theirs.

During her opening statement, then counsel for the General Counsel Leslie Troop theorized that Respondent violated the Act by failing to offer the alleged discriminatees positions as electrical helpers. Counsel for the General Counsel's argument carries surface appeal because even if Respondent legitimately looked for and found electricians which it preferred over the alleged discriminatees, Respondent could easily have considered them for helper positions. Stated in its simplest form, Counsel for the General Counsel's argument is that if the "union" applicants were not eligible for immediate hiring as journeymen due to lack of recent, relevant experience, surely they should be considered for and offered a helper position because they were far more qualified than any helper hired.

On more than one occasion during the trial, Widemire was pressed to explain why one of the alleged discriminatees, particularly, though not exclusively, Zylks, was not offered a helper's position. Widemire testified consistently and credibly:

> The only times that I would have hired somebody at a lower electrical rate was if they came in and I spoke to them personally and in the interview process, determined that their experience had not been at a full journeyman rate. Anytime I did that, I also communicated with Mr. Daniels on those particular applications or applicants that had come back in, and that decision was made in the interviewing process, between myself and the applicant. I never went into the files and just offered anybody a lower rate of pay, unless we discussed it personally.
>
> . . . .
>
> I would not offer an applicant that applied as a journeyman electrician and showed that he had been doing work as a journeyman electrician at the journeyman wage rate a helper's job, unless, in the course of the conversation, in interviewing that employee, he initiated or indicated in some way that the applicant would be willing to take a job as a helper.

Respondent readily admits that it did not consider any of the alleged discriminatees for helper positions. In fact, Respondent simply did not consider anyone who applied as a journeyman electrician for a position as helper unless the applicant made it clear, on his own initiative, that he was interested in a helper's job—a downgrade. Carroll Carter was the only alleged discriminatee to put "apprentice" in second choice. The record, however, shows that once an application was coded as a journeyman electrician, the recruiters never went to that folder to recruit or select helpers unless the individual applicant made it clear that he or she was willing to take less than a journeyman's position and initiated that conversation.

Widemire explained that an applicant who showed no journeyman experience, generally by job duties and pay levels, would be considered a helper. Applicants, though, who were in fact journeymen, as each of the alleged discriminatees were, and were coded as such, were not considered for helper positions. None of the alleged discriminatees were coded as helpers, and none of them from their previous work or resumes, where submitted, or pay rates should have been coded as a helper.

Approximately 170 electrical helpers were hired for Shell Chemical and 160 were hired for BASF. Most of these applicants and the other, approximately 375 applicants for helpers' positions who were not hired, indicated on their field employment Application position applied for first choice—"electrical helper" or some shorter form. Some people whose experience showed them to actually be helpers did apply as their "first choice" for "electrician" positions. The clerical staff or the recruiters caught most of those and coded them with an appro-

priate electrical helper code, depending upon experience and pay rates shown. Those people were considered helpers because they showed no journeyman experience. They are not examples of Brown & Root coding a qualified journeyman electrician as a helper in order to hire that person.

In conclusion, it must be noted that counsel for the General Counsel put on no evidence and did not call a single witness to suggest that any of the alleged discriminatees applied for, was interested in, or would have accepted an electrical helper position. Nevertheless, counsel for the General Counsel argues that Respondent should have considered alleged discriminatees for helper positions. While counsel for the General Counsel's position has a certain emotional appeal, further analysis, however, shows that Respondent simply did not hire helpers in the manner that counsel for the General Counsel argues Respondent ought to have done. In short, Respondent was under no affirmative obligation to change its hiring practices in order to give alleged discriminatees preferred consideration for helper positions.

From the time Zylks first applied on January 20, 1998, it was clear that his continuous employment as an electrician ended on June 4, 1995. There was no change in the substance of his first application when it was reactivated on February 16, nor in his March 2 application when it was updated four times. At least through July 1998, there was absolutely no indication on any of Zylks' applications that during the previous 3 years, Zylks had performed any of the work normally performed on a daily basis by electricians.

Zylks completed a new application on August 18, which did provide some new and different information from his previous applications. This August 1998 application, while containing the same information in the previous employment section from June 5, 1995, to present as a union organizer, did include for the first time employment from April 9 to May 9, 1997, for ISC at Texaco. Zylks, however, did not explain what his job title and duties were beyond stating "Electrician." In addition, Zylks added another employer's name, Westgate, as having employed him from January 6 to February 6, 1996, at PSC Nitrogen. Again, the job title and duties were described simply as "Electrician." Zylks again updated his August application on September 17, without change.

On October 16, Zylks completed a new application that noted in the section for previous employment "same as other applications," but added that he had worked from September 21 to October 7, 1998, for "HB Zachary" at Port Allen, Louisiana. Zylks again, however, listed his job title and duties merely as "Electrician."

Zylks' applications, both individually and collectively, showed very little, specific relevant experience, i.e., experience in the petrochemical industry running conduit, pulling wires, and installing cable trays. Perhaps H. B. Zachry for less than 3 weeks in Port Allen would qualify, but without a description of which plant or which duties beyond "electrician" that was uncertain. The October 16 application also showed work for 1 month from April 9 to May 9, 1997, at Texaco but with the only description of job title and duties as "electrician." That application also showed work with Westgate from January 6 to February 6, 1996, at PSC Nitrogen which might have helped, but again the only description of job title and duties was "electrician." Widemire and Chruma remained unimpressed with Zylks' qualifications for working at Shell Chemical or BASF.

Zylks, of course, was not entitled to any preferential consideration under the field hiring procedure. In short, Zylks never offered any explanation as to the specific type of work that he had performed with contractors since becoming a full-time union organizer in June 1995. There was simply nothing on any of Zylks' applications to establish that Zylks had recent, relevant experience. There was no indication that Zylks had run conduit, installed cable trays, pulled wire or the other activities that would have been relevant to the Shell Chemical project. Based on these facts, I conclude that Respondent had sound, objective reasons, having nothing whatever to do with Zylks' union affiliation, to pass over Zylks and hire other people who showed more recent and genuinely relevant experience similar to what Respondent was doing at Shell. I find that Respondent did not discriminate unlawfully in failing to hire Zylks.

The broad theory articulated in counsel for the General Counsel's opening statement included the argument the Respondent discriminated against the alleged discriminatees by not hiring any of them as instrument fitters. The unchallenged and credible testimony of clericals Allgood and Jordan, recruiters Marshall and Widemire, and Personnel Manager Chruma was that at the Gonzales employment office, applications were coded and filed according to the craft which the applicant placed in the position applied for first choice section. Each of the alleged discriminatees applied for an electrician position and noted that in the first choice section.

While a handful of applicants noted, in addition to electrician in the first choice section, an interest in instrument technician positions, each of the alleged discriminatee's applications was filed in the journeyman electrician folder, either Brown & Root or non-Brown & Root, as appropriate. No alleged discriminatees' applications were ever in the instrument fitter folder. No instrument fitters were hired on the Shell Chemical project. Instrument fitters were employed only at BASF. The record shows, and Respondent candidly admits, that none of the alleged discriminatees were ever considered for instrument fitter positions because the applications were all coded and filed with first choice being "Electrician."

Respondent argues the complaint must be dismissed with respect to the job category of instrument fitters because an essential element of the Government's proof, namely, application for the job, is missing. Obviously Respondent's argument is too simplistic. Be that as it may, the fact remains that the alleged discriminatees were not considered for positions as instrument fitters—not because of their union affiliation—but because of the simple mechanics of Respondent's hiring system. Once again it must be observed that Respondent was under no affirmative obligation to change its hiring practices in order to give alleged discriminatees consideration for open positions. Accordingly, I find that Respondent did not fail to consider or hire alleged discriminatees for instrument fitter positions because of their union affiliation.

CONCLUSIONS OF LAW

1. Respondent is, and has been at all times material, an employer engaged in commerce within the meaning of Section 2(2), (6), and (7) of the Act.

2. The Union is, and has been at all times material, a labor organization within the meaning of Section 2(5) of the Act.

3. The evidence fails to establish that Respondent refused to consider or hire alleged discriminatees named in the complaint because of their union affiliation, activities, or sentiments in violation of Section 8(a)(1) or (3) of the Act, and the complaint herein will be dismissed.

Accordingly, I issue the following recommended[5]

ORDER

The complaint is dismissed in its entirety.

Dated at Washington, DC June 28, 2000

[5] If no exceptions are filed as provided by Sec. 102.46 of the Board's Rules and Regulations, the findings, conclusions, and recommended Order shall, as provided in Sec. 102.48 of the Rules, be adopted by the Board and all objections to them shall be deemed waived for all purposes.